84998-6

No. _____
Court of Appeals No. 40247-5-II
Pierce County Superior Court No. 08 2 09228 9

SUPREME COURT OF THE STATE OF WASHINGTON

ANGELA ERDMAN,

Plaintiff/Appellant,

v.

CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE, individually; and the marital community of MARK J. TOONE and "JANE DOE" TOONE,

Defendants/Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

The Chapel Hill Presbyterian Church ("Church") and Mark Toone ask this Court to accept review of the Court of Appeals' decision designated in Part II. The Church and Toone were Respondents in the Court of Appeals, Division II, case number 40247-5-II, and Defendants in Pierce County Superior Court Cause No. 08-2-09228-9.

II. CITATION TO THE COURT OF APPEALS DECISION

The Petitioners seek review of that part of the decision of the Court of Appeals that reversed the trial court's summary judgment dismissal of Erdman's negligent retention, negligent supervision, and Title VII sex discrimination claims against the Church. The published opinion of Division II of the Court of Appeals, filed June 29, 2010, is attached as Appendix A. An order amending this opinion and denying reconsideration, filed on July 28, 2010, is attached as Appendix B. A copy of the opinion as amended, *Erdman v. Chapel Hill Presbyterian Church*, __ Wn. App. __, 234 P.3d 299 (2010), is attached as Appendix C.

III. ISSUES PRESENTED FOR REVIEW

A. Is the Court of Appeals' opinion allowing Erdman to claim that the Church negligently retained and supervised Pastor Toone in conflict with Division I's holding that "civil courts may not adjudicate matters involving a church's selection of its spiritual leaders" in *Elvig v. Ackles,* 123 Wn. App. 491, 98 P.3d 524 (2004)?

B. Is the Court of Appeals' holding that the ecclesiastical abstention doctrine did not bar Erdman's Title VII sex discrimination, negligent retention, and negligent supervision claims in conflict with Division I's holding that "civil courts must defer to the highest church tribunal's resolution" of ecclesiastical issues in *Elvig*, 123 Wn. App. at 496?

C. Is a significant constitutional law question presented by the Court of Appeals' holding that the First Amendment did not bar Erdman's negligent retention and supervision claims against the Church even though these claims would require a civil court to adjudicate matters involving the Church's retention and supervision of its spiritual leader?

D. Is a significant constitutional law question presented by the Court of Appeals' holding that the ecclesiastical abstention doctrine did not bar Erdman's Title VII sex discrimination claim against the Church?

E. Is a significant constitutional law question presented by the Court of Appeals' holding that the ministerial exception doctrine did not bar Erdman's Title VII sex discrimination claim against the Church?

F. Is an issue of substantial public interest presented by the Court of Appeals' holding that the ecclesiastical abstention and ministerial exception doctrines did not bar Erdman's Title VII sex discrimination or her negligent retention and supervision claims?

IV. STATEMENT OF THE CASE

A. Erdman Hired as the Executive for Stewardship of the Church.

Since June 2003, Plaintiff Angela Erdman has been an Elder of the Chapel Hill Presbyterian Church. Respondents' Supplemental Designation of Clerk's Papers ("Supp. CP") at 810. As an Elder, Erdman took ordination vows where she agreed to be bound by the disciplinary procedures of the Church and to seek reconciliation and resolve disputes in accordance with Church procedure. Supp. CP 810, 817-18.

In 2005, Erdman was hired by the Church as its Executive for Stewardship. Her job duties included facilitating the development of the vision, goals, and strategies for the Church; providing strategic leadership; helping to make decisions regarding the financial and development strategies and goals of the Church; and creating a major donor development plan for the Church. Supp. CP 811, 819-20.

From 2005 to spring 2007, Erdman's performance was excellent. Supp. CP 811. Erdman reported to the Senior Pastor, Dr. Mark Toone, who was responsible for evaluating her work. Supp. CP 811, 821-28.

Toone has been the Senior Pastor of the Church since 1987. Supp. CP 810. As Senior Pastor, Toone taught classes about theological, biblical, and historical topics for Church members. Periodically, these classes have been augmented by tours to locations of religious and historical significance. Supp. CP 811. Toone, who has been leading these religious tours for over 20 years, uses personal vacation time while leading the tours. Supp. CP 811.

B. Erdman Repeatedly Questioned the Propriety of the Tours Led by Toone.

In June 2007, Erdman questioned whether the tours led by Toone would jeopardize the Church's tax exempt status. Supp. CP 812. Toone told Erdman that she should not address this issue until he returned from sabbatical later that summer. Supp. CP 812.

Erdman, however, ignored Toone's instruction and removed an announcement of an upcoming tour from a Church bulletin after Toone had approved the announcement and instructed that it appear in the bulletin. Supp. CP 812. In addition, she corresponded with the Church's accountant regarding the propriety of the tours. Supp. CP 812.

After Toone returned from sabbatical in September 2007, Erdman raised the issue of the tours again. Supp. CP 812. Toone assured her that these tours were consistent with the Church's mission, that these types of tours were a common ministry practice for many clergy, that the way the Church handled these tours was typical of the approaches taken by other churches, and that he was certain that the tours did not put the Church at risk. Supp. CP 812. Nevertheless, Toone agreed to discuss the issue with his accountant and review information presented by Erdman before making a decision about the tours. *Id.* Until that time, Toone told Erdman that he would not change the long-standing practices of how these tours were handled and that the matter was "out of [her] hands." Supp. CP 812.

Subsequently, the accountant assured Toone that the tours were being conducted properly and that they did not threaten the Church's tax exempt status. Supp. CP 813. Toone then sent Erdman an email stating

that he was satisfied that the tours were being handled appropriately. Supp. CP 813, 829. The email also stated that Toone "wanted to close the loop" on this issue with Erdman. Supp. CP 829.

Erdman, however, responded to the email by asking again via email if she could discuss the tours with Toone. Supp. CP 813, 829. When Toone did not respond, Erdman sent him another email the next day that again requested that they meet to discuss the tours. Supp. CP 813, 829.

After receiving Erdman's second email, Toone met with Erdman on October 17, 2007. Supp. CP 813. At that meeting, Toone emphatically told Erdman that the tours were proper, that they did not jeopardize the Church's tax exempt status, that she should not concern herself with this matter anymore, that her continuing to question these tours was insubordination, and that she had unfairly impugned his reputation. Supp. CP 813. Erdman responded by accusing Toone of intimidation and she threatened to quit rather than follow his directives. Supp. CP 813. In an attempt to resolve this dispute, Toone suspended all promotional activity for the next tour and agreed to immediately turn the matter over to the Session, the governing body for the Chapel Hill Presbyterian Church. *Id.*

C. A Session Committee Investigated Erdman's Claims.

Within hours after meeting with Erdman, Toone appointed a committee of Session members to review the educational tours and the conflict with Erdman. Supp. CP 813. Toone appointed the committee in

accordance with the Presbyterian Church (U.S.A.)'s Book of Order[1] and Session Committee Principles. Supp. CP 813-14, 830-32. Toone agreed that he would abide by the decisions of the Session Committee, including stopping the educational tours if that was the recommendation of the Committee. Supp. CP 814, 997.

On October 18, 2007, the Session Committee met with Erdman to hear her concerns. Supp. CP 997. The Committee addressed the interpersonal issues between Erdman and Toone, hoping to resolve these issues. Supp. CP 995-98. In addition, the Committee began its review of the educational tours by seeking the opinions of experts. Supp. CP 998.

After having missed work since the October 17 meeting, Erdman requested a medical leave on October 22, 2007, complaining that she was too stressed to work. Toone granted the request. Supp. CP 814.

Unfortunately, the Committee's attempts at mediating the dispute between Erdman and Toone did not go well. Supp. CP 996. The animosity expressed by Erdman towards Toone made it difficult for the two to work together in the future. Supp. CP 814, 996.

In November 2007, before the Session Committee had completed its investigation, Erdman's attorney contacted a Committee Member and threatened to damage the Church by publicizing Erdman's allegations

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[1] The Book of Order outlines the form of Church government, the Church's theology, and the member and officer discipline and conflict resolution processes. Supp. CP 810-11.

unless the Church agreed to give Erdman a severance package. Supp. CP 809. The Session Committee was shocked by this threat. Supp. CP 809.

Subsequently, Erdman's attorney informed the Church's attorney that unless her client received a full year of severance pay, Erdman would return to work on December 3, 2007. Supp. CP 814. Given the unresolved conflict with Toone, the Church responded by placing Erdman on administrative leave with pay, pending resolution of the Church's investigation. Supp. CP 814.

In December 2007, before the Session Committee had completed its investigation, Erdman filed a grievance with the Presbytery of Olympia. Supp. CP 814, 998, 1000, 1002-11. The Presbytery of Olympia is the governing body for the area that includes Chapel Hill. Supp. CP 814.

Erdman's complaint was filed in accordance with the Book of Order Section D-10.0100. Supp. CP 814, 833-40. The grievance, which was sent to Session Committee members, two other employees of Chapel Hill, and the Clerk for the Presbytery, contained references to alleged violations of the Book of Order and scripture by Toone as well as confidential information concerning a Church donor. Supp. CP 814, 998, 1000-01, 1003-11. The Session Committee then asked to meet with Erdman, but she refused. Supp. CP 998, 1012.

The Session Committee issued its report on December 27, 2007. Supp. CP 998, 1013-17. The report recommended that Erdman be terminated immediately. Supp. CP 998, 1013. The Session Committee was particularly upset by Erdman's implied threats that unless the Church gave

into her demand for a year's severance, there would be undesirable consequences for the Church. Supp. CP 998.

The Session Committee concluded that Erdman "had failed to follow the scriptural teaching concerning our relationships within the body of Christ." Supp. CP 1015. The Committee also found that Erdman had violated her ordination vows. Supp. CP 1016-17.

In addition, the Session Committee concluded that the allegations in Erdman's December grievance were inaccurate and violated the Book of Order. Supp. CP 998. The Committee also found that Erdman's communication included false and misleading statements. Supp. CP 998-99. The Session Committee stated that it believed that Erdman had previously misrepresented the facts underlying the educational tours to the Church's accountant by stating that the tours were not part of the Church's ministry. Supp. CP 999. The Session Committee concluded that the tours were being conducted properly and that Toone had acted appropriately. Supp. CP 999, 1016. Finally, the Committee concluded that there was no evidence of unlawful harassment by Toone. Supp. CP 983, 999, 1016.

Because Erdman had improperly distributed disparaging and derogatory emails that contained false statements and confidential information, and because she threatened to dishonor the Church in an attempt to receive a severance package, the Session Committee recommended that she be terminated. Supp. CP 999, 1013. By letter dated December 28, 2007, Erdman was fired, effective December 31, 2007. Supp. CP 815, 841.

D. The Investigative Committee of the Presbytery of Olympia Rejected Erdman's Allegations.

In early January 2008, Erdman resubmitted her complaint with the Presbytery of Olympia (using the proper form, called "Form No. 26"), again in accordance the Book of Order. Supp. CP 815, 842-46. Erdman's Form No. 26 grievance accused Toone of violating scripture and church law, misusing church possessions for personal gain, and verbally abusing and harassing Erdman. Supp. CP 815, 842-46. In her complaint to the Presbytery, Erdman also alleged that "significant portions" of the Session Committee's report were "inaccurate and reflect bearing of false witness and distortion of the truth." Supp. CP 845.

An Investigative Committee of the Presbytery spent several months examining Erdman's allegations. Supp. CP 815, 848. In the process, the Investigative Committee conducted several interviews with witnesses and evaluated numerous records and documents. *Id.*

On May 27, 2008, the Investigative Committee declined to file charges against Toone, concluding that Erdman's allegations "cannot be reasonably proved." Supp. CP 815, 848. Under the Book of Order, Erdman had the right to appeal this decision. Supp. CP 815, 837. Erdman, however, did not appeal. Supp. CP 815.

E. The Trial Court Dismissed Erdman's Claims That Were Based Upon Allegations Presented to the Investigative Committee, and her Outrage and Washington State Discrimination Claims.

Instead of appealing the Investigative Committee's decision, Erdman filed suit against the Church and Toone on June 12, 2008. The

Complaint alleged negligent retention, negligent supervision, sex and religious discrimination, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful discharge, and wrongful termination in violation of public policy. CP 3-13. After being served with Defendants' motion for summary judgment, Erdman amended her complaint to include a claim for violation of 42 U.S.C § 2000e-2 ("Title VII"). CP 96-98.

The Defendants then filed a revised summary judgment motion which included Erdman's Title VII claim. CP 200-28. The Defendants' motion primarily contended that the trial court must defer to the decisions of the ecclesiastical tribunals of the Presbyterian Church; that the court lacked jurisdiction to resolve a dispute between the Church and a ministerial employee; and that Washington's Law Against Discrimination (WLAD) specifically excludes nonprofit religious organizations. The Defendants also offered additional grounds for dismissing Erdman's other claims (negligent infliction of emotional distress, outrage, wrongful termination, and unlawful withholding of wages). CP 221-28.

On March 27, 2009, the trial court partially granted the Defendants' summary judgment motion. CP 726-28. The trial court dismissed Plaintiff's WLAD and outrage claims, as well as Plaintiff's claims that were based upon facts raised in Erdman's Form No. 26 grievance to the Presbytery of Olympia. Thus, Erdman's claims that were based entirely upon facts raised in the Form No. 26 grievance, such as negligent retention, negligent supervision, wrongful discharge, and

wrongful termination in violation of public policy, were dismissed completely. CP 726-28.

However, other claims that were based partially on Erdman's Form No. 26 grievance and partially on events that allegedly occurred after the grievance—such as Erdman's Retaliation, Negligent Infliction of Emotional Distress, and Title VII claims—were dismissed only to the extent that these claims were based upon facts raised in Erdman's Form No. 26 grievance to the Presbytery of Olympia. In addition, claims that arose after the Form No. 26 grievance were left standing. CP 726-28.

The Defendants subsequently moved for the summary judgment dismissal of these remaining claims. Supp. CP 1048-60. Before Defendants' second motion could be heard, however, Erdman voluntarily dismissed her remaining claims. CP 799. Erdman subsequently filed her notice of appeal challenging the trial court's summary judgment order[2] and orders limiting discovery of the Presbytery of Olympia. CP 800.

F. The Court of Appeals Affirms and Reverses the Trial Court.

The Court of Appeals issued its decision on June 29, 2010. The Church and Toone then moved for reconsideration. The Court of Appeals issued an Order Amending Opinion and Denying Motion for Reconsideration on July 28, 2010.

As stated in the amended opinion, the Court of Appeals affirmed the dismissal of Erdman's negligent infliction of emotional distress and

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2 Erdman did not appeal the dismissal of her intentional infliction of emotional distress claim. *Erdman*, 234 P.3d at 311 n.20.

WLAD claims against the Church; her Title VII claims against Toone; her Title VII religious discrimination claim against the Church; her common law claims for retaliation, wrongful termination, and wrongful discharge against the Church; and the trial court's orders limiting discovery. *Erdman,* 234 P.3d at 310-11.

The Court of Appeals, however, reversed the trial court's dismissal of Erdman's negligent infliction of emotional distress claim against Toone; her negligent supervision, negligent retention claims against the Church for its retention and supervision of Toone; and her Title VII sex discrimination claim against the Church. 234 P.3d at 311. The Court of Appeals remanded these claims to the trial court.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A petition for discretionary review should be granted if the underlying decision conflicts with a decision of the Court of Appeals, involves a significant constitutional law question, or involves an issue of substantial public interest. RAP 13.4(b). These grounds are present here.

A. Allowing Erdman's Negligence Claims To Proceed Violates the First Amendment and Conflicts with *Elvig*.

The Court of Appeals held that Erdman's negligent retention and supervision claims may proceed against the Church, thereby allowing Erdman to claim that the Church acted improperly when it retained and supervised Toone. *Erdman*, 234 P.3d at 308. A secular court, however, cannot question personnel decisions concerning a church's minister without violating the First Amendment. *See Elvig*.

As the *Elvig* court explained:

> [C]civil courts may not adjudicate matters involving a church's selection of its spiritual leaders. This "ministerial exception" is a constitutionally-derived exception to civil rights legislation that "insulates a religious organization's employment decisions regarding its ministers from judicial scrutiny[.]" . . . It applies "when the disputed employment practices involve a church's freedom to choose its ministers or to practice its beliefs." . . . We implicitly adopted this exception in *Gates v. Seattle Archdiocese*. There, we stated that secular courts must avoid controversies between a church and its minister "because the 'introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.' "

Elvig, 123 Wn. App. at 496-97 (quoting *Gates v. Seattle Archdiocese,* 103 Wn. App. 160, 10 P.3d 435 (2000)) (footnotes omitted). This ministerial exception applies to state law claims in addition to federal discrimination claims. *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999).

Here, Erdman claims that the Church negligently retained Toone as its pastor. As *Elvig* noted, however, a secular court cannot question a church's decision to retain its minister without violating the First Amendment. Indeed, even requiring a church "to articulate a religious justification for its personnel decisions" would violate the First Amendment. *Bollard* at 946.

Similarly, Erdman's negligent supervision claim would require a secular court to inquire impermissibly into personnel decisions involving a minister. A Session Committee of the Church investigated Erdman's

allegations against Toone. Supp. CP. 995-98. The Committee concluded that Erdman, and not Toone, acted improperly and that she had violated scripture and her ordination vows. Supp. CP 1015-17.

In addition, Erdman's Form No. 26 grievance to the Presbytery of Olympia accused Toone of violating scripture and church law and harassing Erdman, and accused the Session Committee of issuing a report that distorted the truth. Supp. CP. 842-46. An Investigative Committee of the Presbytery of Olympia investigated these claims and concluded that they could not be established. Supp. CP. 815, 848.

Erdman's negligent supervision claim, if allowed to proceed, would require that a secular court examine personnel decisions involving the supervision of Toone, the actions of the Session Committee, and the decision of the Investigative Committee to reject Erdman's claims. Erdman's negligence claims would require the court to evaluate the reasonableness of Church's protected employment choices to ascertain if it breached any duty owed Erdman. Because this examination would violate the First Amendment and conflict with *Elvig*, the Defendants request that the Court grant its petition for review.

Also, courts have held that the ministerial exception bars the Title VII sex discrimination claims of ministerial employees. *See e.g. Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) ("for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee."); *Rayburn v. General Conference of Seventh-Day*

Adventists, 772 F.2d 1164 (4th Cir. 1985) (ministerial exception supports dismissal of Title VII sex discrimination claim).

Moreover, the ministerial exception "applies not just to ordained clergy, but to all employees of a religious institution whose primary functions serve the church's spiritual and pastoral mission." *Gates,* 103 Wn. App. at 166. Erdman qualified as a ministerial employee because her primary job duties included facilitating the development of the vision, goals, and strategies for the Church; providing strategic leadership; and helping to make decisions regarding the financial and development strategies and goals of the Church. Supp. CP 811, 819-20. Thus, the ministerial exception bars Erdman's Title VII and negligence claims.

B. Ecclesiastical Abstention Requires Deference to Decisions of Tribunals of Hierarchical Religious Organizations on Matters of Discipline, Faith, or Ecclesiastical Law.

The Supreme Court has held that the U.S. Constitution requires that courts defer to the decisions of ecclesiastical tribunals of hierarchical religious organizations:

> [T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich, 426 U.S. 696, 724-25, 96 S. Ct. 2372 (1976). As the Court

explained: "[C]ivil courts are bound to accept the decisions of the highest judiciaries of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Milivojevich,* 426 U.S. at 713 (emphasis added).

Applying *Milivojevich*, several courts have held that the First Amendment bars a plaintiff's Title VII claim. *See, e.g., Young v. Northern Illinois Conference Of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994). In *Young*, the Seventh Circuit stated that:

> *Milivojevich*, read in its entirety, holds that civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are in themselves an "extensive inquiry" into religious law and practice, and hence forbidden by the First Amendment.

Young at 187. For this reason, the Seventh Circuit affirmed the summary judgment dismissal of a plaintiff's race and sex discrimination claims brought under Title VII. *Young*, 21 F.3d at 187-88.

Similarly, Washington courts must defer to decisions rendered by tribunals of hierarchically-organized churches. *Elvig,* 123 Wn. App. at 496. In *Elvig*, a female minister of a Presbyterian church accused the church's senior minister of sexual harassment. 123 Wn. App. at 493. The claims of sexual harassment against the senior minister were referred to an Investigative Committee of a different Presbyterian church. *Elvig,* 123 Wn. App. at 493-94. The Investigative Committee examined the matter and concluded that charges would not be filed against the senior minister. *Id.* at 494. The plaintiff in *Elvig* appealed this decision to the Permanent

Judicial Commission of the Presbytery, which affirmed the decision of the Investigative Committee. *Id.*

Subsequently, the plaintiff filed suit in state court against the senior minister, the church, and the presbytery. *Elvig,* 123 Wn. App. at 494. The plaintiff alleged sexual harassment, retaliation, aiding and abetting, and defamation by the senior minister; retaliation and negligent supervision by the church; and retaliation, aiding and abetting, and negligent supervision by the presbytery. *Id.* at 495. On summary judgment, the trial court dismissed all of plaintiff's claims except for defamation, which was then voluntarily withdrawn by the plaintiff. *Id.*

In upholding the summary judgment dismissal, the *Elvig* court noted that Washington courts may not adjudicate disputes that have been resolved by tribunals of hierarchically-organized churches:

> In Washington, civil courts may adjudicate church-related disputes only if the dispute does not involve ecclesiastical or doctrinal issues. [footnote omitted] "The First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles." **But if the church accused of wrongdoing is a member of a hierarchically-organized church that has ecclesiastical judicial tribunals, civil courts must defer to the highest church tribunal's resolution of the matter, despite the fact that the dispute could be resolved by a civil court.**

Elvig, 123 Wn. App. at 496 (footnotes omitted) (emphasis added).

In addition, *Elvig* stated that it was "undisputed that the Presbyterian Church is a hierarchically-structured church." *Elvig*, 123 Wn.

App at 497 n.15. This hierarchal structure consists of governing bodies called session, presbytery, synod, and General Assembly. Supp. CP 815.

Next, the *Elvig* court reasoned that a trial court could not question the decisions of the Presbyterian tribunals without impermissibly undermining the Church's authority:

> Here, Elvig's case centers on the claim that church authorities learned of the sexual harassment but failed to discipline Ackles and instead precluded Elvig from seeking other work. But the church declined to discipline Ackles because its Investigative Committee and Permanent Judicial Commission decided that insufficient evidence existed to file a charge. . . . Thus Elvig's negligent supervision and aiding and abetting claims would require a secular court to examine decisions made by ecclesiastical judicial bodies, and her retaliation claims would require a court to question and interpret the transfer rule in the church's Book of Order. **We can do neither without effectively undermining the church's inherent autonomy.**

Elvig, 123 Wn. App. at 498-99 (emphasis added). As a result, the *Elvig* court affirmed the trial court's dismissal of the plaintiff's claims against the presbytery, the church, and the senior minister. *Id.* at 499.

Like the plaintiff in *Elvig*, Erdman also took ordination vows to be bound by the Presbytery's judgment. Supp. CP 810, 817-18. For example, Erdman vowed "to be governed by [the Church's] polity" and "to abide by its discipline." Supp. CP 810, 817 (Book of Order G-14.0207(e)).

Consistent with these vows, Erdman filed her Form No. 26 grievance acknowledging that her complaint is "under the jurisdiction of the Olympia Presbytery." CP 843. Furthermore, Erdman's grievance

involved matters of discipline and church law, in addition to alleging wrongful discharge, and harassment and verbal abuse by Toone:

> I believe Mark Toone's conduct and actions violate scripture as found in Exodus 22:3b & 23:1, Leviticus 6:2-5 & 19:15-16, Matthew 5:25, 18:15-17 & 20:28, Mark 10:19, Luke 16:2, Romans 13:1-7 . . . .
>
> I believe Mark Toone's conduct and actions are inconsistent with the teachings found in The Book of Confessions (PCUSA) . . . .
>
> I believe Mark Toone violated his ordination vows, specifically as found in The Book of Order G-14.0405b: items 4, 5, 6, 7, 8 and 9.
>
> I believe Mark Toone violated his responsibilities as outlined in The Book of Order G-1.0304, G-3.0200, G-6.0106, G-10.0102: n *(which also include possible violations of Chapel Hill Session Policies EL-1, EL-2a, EL-2b, EL-2f, EL-2g, EL-2h, GP-2d, GP-4, SSPL-2a and Chapel Hill Employee Handbook provisions against harassment (pages 5 & 6)) and o, and G-14.0103.*

Supp. CP 845-46.

The report of the Session Committee also supports the conclusion that Erdman's allegations involved matters of Church discipline, faith, and ecclesiastical law. The report, for example, detailed specific sections of the Book of Order that were violated by Erdman. The Session Committee also concluded that Erdman "failed to follow the scriptural teaching concerning our relationships within the body of Christ as found in Matthew 5:25, Ephesians 4:3, . . ." Supp. CP 1015.

The similarities between this case and *Elvig* are striking. Both cases involved claims of sexual harassment and retaliation against a senior

Presbyterian minister and negligent supervision against a Presbyterian church. In both cases, the plaintiffs took vows to be governed by the Presbyterian Church and to abide by its discipline. And in both cases, an ecclesiastical tribunal of the Presbyterian church investigated and rejected the plaintiff's claims after concluding that the claims could not be proven.

Given these similarities, the trial court correctly held that *Elvig* requires the dismissal of Erdman's claims that were presented to the Presbytery of Olympia. CP 727-28, RP 4-5. To hold otherwise would require a court to examine decisions made by the Investigative Committee. Because this examination would violate the First Amendment and the ecclesiastical abstention doctrine, and because the Court of Appeals' decision here conflicts with *Elvig*, this Court should grant review.

VI. CONCLUSION

The Petitioners request that the Court grant their petition for discretionary review and reverse the Court of Appeals' decision allowing Erdman's negligent retention, negligent supervision and Title VII sex discrimination claims.

RESPECTFULLY SUBMITTED this 26th day of August, 2010.

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By _____
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APPENDIX A: *Erdman v. Chapel Hill Presbyterian Church*, published opinion in Court of Appeal Cause #40247-5-II, filed June 29, 2010

APPENDIX B: Order Amending Opinion and Denying Motion for Reconsideration, filed July 28, 2010

APPENDIX C: *Erdman v. Chapel Hill Presbyterian Church*, __ Wn. App. __, 234 P.3d 299 (2010)

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ANGELA ERDMAN, Appellant, v. CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE, individually; and the marital community of MARK J. TOONE and JANE DOE TOONE, Respondents.	No. 40247-5-II PUBLISHED OPINION

Houghton, J.P.T.[1] — Angela Erdman appeals the trial court's order dismissing her claims against Chapel Hill Presbyterian Church (Church) and its pastor, Mark Toone. She argues that the trial court erred in limiting discovery and in granting summary judgment. She also argues that RCW 49.60.040(11), the religious employer exemption under chapter 49.60 RCW, the Washington Law against Discrimination (WLAD), violates the state and federal constitutions. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

In 2003, Erdman became a Church elder. As an elder, she took ordination vows in which she agreed to the Church's dispute resolution and disciplinary procedures.

[1] Judge Houghton is serving as judge pro tempore of the Court of Appeals, Division II under RCW 2.06.150.

In 2005, the Church hired Erdman as its Executive for Stewardship. The Church's job description for this position sets forth duties such as assisting with the development of the Church's vision, goals, and strategies; providing strategic leadership; assisting with decisions about the Church's financial and development strategies and goals; and creating a major donor development plan for the Church. The position did not require candidates to be an elder or to belong to the Church.

According to Erdman, her job generally involved developing the Church's annual budget, including managing an accounting and finance team; managing a department "responsible for all "accounting, payroll, tax, pricing, and banking functions;" and providing business case analysis, reviews, reports, and income statements to the Church and its lenders. Clerk's Papers (CP) at 317. The Church did not authorize her to administer sacraments or to conduct religious services as part of her position.

This case arises from Erdman's belief that tours of religious and historical sites led by Toone, the Church's senior pastor, possibly jeopardized the Church's tax exempt status. In September 2007, Erdman asked Toone to discuss her concerns about the tours. He assured her that the tours comported with the Church's mission and that many clergy followed this common ministry practice. He told her that he had also read documents she supplied regarding the issue and had discussed the matter with his accountant, who advised that the tours did not threaten the Church's tax exempt status.

On October 16, 2007, Toone sent Erdman an email stating that discussions between his and the Church's accountant assured him that the tours were proper and that he wanted to "close

the loop" on the issue. CP (filed Oct. 28, 2009) at 829. Erdman responded twice, requesting Toone meet with her to discuss the tours.

On October 17, Toone met with Erdman. According to her, Toone stormed into her office; slammed the door; and proceeded to harass, physically intimidate, and verbally abuse her for 25 minutes.[2] Toone told her that the tours were proper, that her continued questioning was insubordination, and that she had unfairly impugned his reputation. That same day, she notified the Church's human resource director that she would not return to work in the near future. She also submitted a written complaint against Toone to the Church's human resource director.[3] On October 29, she took formal medical leave.

To resolve the dispute, Toone suspended all promotional activity for an upcoming tour and agreed to turn the matter over to the Church's governing body, the Session. A Session Committee, eventually comprising of five Church elders, met with Erdman to hear her concerns, review the tours, and address the interpersonal issues between her and Toone.

On November 30, Erdman contacted the Church, stating that her doctor had cleared her to return to work. The Church responded by placing her on administrative leave with pay, pending the Session Committee's investigation. In December, before the Session Committee completed its investigation, Erdman filed a grievance against Toone with the Presbytery of Olympia

[2] According to the Church's human resources director, since 1996, 15 other female church employees had made complaints about Toone's behavior. She did not recall the specific details of those complaints because most of the women said they felt too threatened by Toone to file them in written form.

[3] The Church's employee handbook specifically prohibits sexual harassment. Additionally, the Church's Book of Order (2007-2009) states that its Session possesses responsibility "to provide for the administration of the program of the church, including . . . fair employment practices." CP at 831.

(Presbytery), the regional governing body of the Presbyterian Church. She based her grievance on her interpretation of the tour issue and on Toone's physical intimidation; verbal abuse; and threats about her job, including placing her on administrative leave.

On December 27, the Session Committee issued a report concluding that Toone properly conducted his tours and that he did not harass or intimidate Erdman. The Session Committee also concluded that Erdman's implied threats through her attorney, false statements, and dissemination of disparaging emails throughout the investigation violated her ordination vows and the Church's scriptural teachings. Based on the Session Committee's conclusions and recommendation, the Church terminated Erdman's employment on December 31.

In January 2008, Erdman resubmitted her grievance to the Presbytery using its proper Form No. 26. In her Form No. 26 grievance, she accused Toone of violating scripture and Church law in (1) leading the tours, (2) physically intimidating her, (3) verbally abusing and harassing her, and (4) retaliating against her. Although in her Form No. 26 grievance, she did not set forth specific allegations against the Church, she claimed that Toone worked with the Session to prevent "full disclosure of truth" regarding the tours and that "significant portions" of the Session Committee's report bore "false witness and distortion of truth." CP (filed Oct. 28, 2009) at 845-46.

In response to Erdman's Form No. 26 grievance, the Presbytery appointed an Investigative Committee. After reviewing the matter, the Investigative Committee concluded that Erdman could not substantiate her allegations and declined to "fil[e] charges" against Toone. CP (filed Oct. 28, 2009) at 848. The Presbyterian Church's Book of Order (2007-2009) reserved Erdman's right to appeal the Investigative Committee's decision.

Erdman did not appeal. Instead, she sued Toone[4] and the Church. Toone and the Church moved for summary judgment. In response, Erdman amended her complaint, raising state law claims based on (1) negligent retention, (2) negligent supervision, (3) violations of the WLAD, (4) intentional infliction of emotional distress, (5) negligent infliction of emotional distress, (6) wrongful discharge, (7) wrongful termination in violation of public policy, (8) retaliation, and (9) wrongful withholding of wages. Her amended complaint also raised federal law claims under Title VII of the Civil Rights Act of 1964 based on (1) religious and sexual discrimination, (2) harassment, (3) hostile work environment, and (4) retaliation. 42 U.S.C. § 2000e-2(a)(1).

Before the trial court ruled on the summary judgment motion, Erdman moved to compel the deposition of an Investigative Committee member and production of that Committee's investigation documents. The Church, Toone, and the Presbytery objected, arguing that granting the motions to compel would interfere with the Church's constitutionally protected authority to resolve Church discipline matters in ecclesiastical tribunals.[5]

The trial court reviewed the Investigative Committee's documents in camera.[6] It found that the First Amendment protected the Investigative Committee's thought processes contained in the documents and that Erdman had failed to demonstrate the required necessity for discovery. Although the trial court denied Erdman's motion to compel production of the documents, it

[4] Although Erdman sued Mark and Jane Doe Toone, for clarity we refer to Mark Toone's actions in this opinion.

[5] The Presbytery made a special appearance below for purposes of objecting to a subpoena Erdman sought to enforce against it. It was not a party below. It has submitted an amicus curiae brief on appeal.

[6] The record before us does not disclose what the trial court reviewed. The better practice for trial counsel would have been to move to seal the documents the trial court reviewed in camera, thus allowing for consideration on appeal.

granted her motion to compel the deposition of an Investigative Committee member. In doing so, it noted that no inquiry could be made into the Investigative Committee's thought processes. The trial court also found that the documents established that the Investigative Committee had considered each of Erdman's Form No. 26 grievance allegations.

After the deposition was taken, the Church and Toone renewed their motion for summary judgment. They argued that Erdman was a pastor and the ministerial exception[7] applied depriving the trial court of jurisdiction to resolve disputes involving the relationship between the Church and its ministers. They further argued that the WLAD exempts religious organizations from its prohibitions.

After hearing argument, the trial court stated that it lacked sufficient facts to decide whether Erdman was a minister and declined to rule in the defendant's favor on the ministerial exception.[8] It further dismissed Erdman's intentional infliction of emotional distress (outrage) claims because she failed to meet the relevant legal standards.

Relying on the Division One decision in *Elvig v. Ackles*, 123 Wn. App. 491, 98 P.3d 524 (2004), the trial court also addressed the viability of certain claims under the ecclesiastical

[7] The ministerial exception, precluding civil court review, derives from the Free Exercise and Establishment Clauses of the First Amendment. It serves to protect the relationship between religious organizations and their ministers from unconstitutional government interference. *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999). But the exception does not apply to employees of a religious institution if they are not serving in a ministerial capacity. *Bollard*, 196 F.3d at 947. In *Alcazar v. Corp. of the Catholic Archbishop*, 598 F.3d 668, 676 (9th Cir. 2010), the Ninth Circuit sets forth a three-part test for determining whether the exception applies.

[8] Neither the record before the trial court nor before us adequately demonstrates that Erdman's claims would fail under the ministerial exception. Therefore, on remand, the trial court may consider this exception as further fleshed out by the parties.

abstention doctrine.[9] It dismissed all claims that were based on facts that had been set forth in Erdman's Form No. 26 grievance. The trial court stated that "the decisions made by the [ecclesiastical] tribunal and the matters decided by the tribunal, claims based on those facts are barred." Verbatim Transcript of Proceedings at 25.

As a result, the trial court dismissed Erdman's negligent retention, negligent supervision, wrongful discharge, wrongful termination in violation of public policy, retaliation, negligent infliction of emotional distress, and federal law claims that were based on facts set forth in the grievance. It declined to dismiss her retaliation, negligent infliction of emotional distress, and willful withholding of wages claims that were not based on facts raised in her Form No. 26 grievance.

After Erdman voluntarily dismissed her remaining claims, she sought direct review in our Supreme Court. That court declined review and transferred the matter to us.

ANALYSIS

MOTIONS TO COMPEL DISCOVERY

Erdman first contends that the trial court erred in denying her motion to compel production of documents. She also appeals its limitations on deposition questioning of an Investigative Committee member.

We review a trial court's discovery rulings under an abuse of discretion standard. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). A trial court abuses its

[9] The ecclesiastical abstention doctrine applies and bars civil court jurisdiction where the character of the dispute's subject matter is purely ecclesiastical. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

discretion when it bases its decision on untenable or unreasonable grounds. *T.S.*, 157 Wn.2d at 423.

Without citation to authority or to a record, Erdman argues that the trial court erred by excluding Investigative Committee documents reviewed in camera from discovery and by partially relying on those documents in granting summary judgment. We will not review this claimed error because Erdman failed to provide authority supporting her argument or to secure these documents for our review. *See* RAP 9.2(b) (appellant bears the burden of perfecting the record so that the reviewing court has before it all of the evidence relevant to the issue and matters not in the record will not be considered); RAP 10.3(a)(6) (parties must provide citation to authority supporting their arguments).

Erdman also argues that the trial court improperly limited discovery through deposition testimony. We disagree.

The trial court foreclosed inquiry into the Investigative Committee's thought processes during discovery. We note that Erdman based her claims before the Committee entirely on scripture violations. Because inquiries into "the mind of the church" create an unconstitutional governmental entanglement with the church, the trial court did not abuse its discretion and Erdman's argument fails. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (subjecting church decisions involving spiritual functions to the "full panoply of legal process" violates the First Amendment).

ECCLESIASTICAL ABSTENTION

Erdman next contends that the trial court erred in granting partial summary judgment based on ecclesiastical abstention. She asserts that it should not have dismissed her claims that were based on facts set forth in the Form No. 26 grievance because her claims involve secular issues and thus the Investigative Committee's decision does not bind civil courts.

We review an order granting summary judgment de novo. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 470, 209 P.3d 859 (2009). When reviewing a summary judgment order, we take the evidence in a light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). A trial court properly grants summary judgment when no genuine issues of material fact preclude it. CR 56(c).

The trial court relied on Division One's *Elvig* opinion, 123 Wn. App. at 491, as authority compelling it to dismiss all of Erdman's claims.[10] In *Elvig*, an associate minister filed sexual misconduct complaints with the church about its pastor. *Elvig*, 123 Wn. App. at 493-94. An investigative committee conducted an inquiry and decided not to act against the pastor. *Elvig*, 123 Wn. App. at 494. Elvig appealed to the Permanent Judicial Commission, the Presbytery's highest adjudicatory body, and it affirmed the decision. *Elvig*, 123 Wn. App. at 494. Elvig then brought numerous claims, including sexual harassment, retaliation, and negligent supervision against the church and its pastor in civil court. *Elvig*, 123 Wn. App. at 495. The trial court granted summary judgment in favor of the church and its pastor and dismissed all her claims except one, which she then voluntarily dismissed. *Elvig*, 123 Wn. App. at 495.

[10] Division One recently addressed the ecclesiastical abstention doctrine again in *Rentz v. Werner*, No. 62848-8-I, 2010 WL 2252529 (Wash. Ct. App. June 7, 2010). This case does not affect our analysis.

In affirming dismissal of Elvig's claims on appeal, Division One noted that

> if the church accused of wrongdoing is a member of a hierarchically-organized church that has ecclesiastical judicial tribunals, civil courts must defer to the highest church tribunal's resolution of the matter, despite the fact that the dispute could be resolved by a civil court.

Elvig, 123 Wn. App. at 496. It further stated:

> [A] civil court may adjudicate Elvig's claims only if: (1) liability would be based on secular conduct and would not require the court to interpret church doctrine or religious beliefs; (2) an ecclesiastical tribunal of a hierarchically-structured church has not already resolved the matter; and (3) Elvig's claims do not involve a church's ability to choose its ministers.

123 Wn. App. at 497 (footnote omitted). In setting forth this standard, the *Elvig* court relied on the United States Supreme Court decision in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

In *Watson*, the Supreme Court explained the rationale for the ecclesiastical abstention doctrine:

> As regards its use in the matters we have been discussing it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said in a certain general sense very justly, that it was because the General Assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable.
>
> But it is a very different thing where a subject-matter of dispute, *strictly and purely ecclesiastical in its character*,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,—becomes the subject of its action.

80 U.S. at 732-33 (emphasis added).

Thus, the United States Supreme Court has interpreted the First Amendment to mandate that "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical [structure] on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law" but not necessarily as to matters that fall outside these parameters. *Serbian Eastern Orthodox Diocese for United States of Am. and Canada v. Milivojevich*, 426 U.S. 696, 713, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976). Washington courts have adopted the same rule in the property dispute context. In *Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wn.2d 367, 373, 485 P.2d 615 (1971), our Supreme Court stated:

> [W]here a right of property in an action before a civil court depends upon a question of doctrine, ecclesiastical law, rule or custom, or church government, and the question has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive.

Therefore, both federal and Washington courts abstain from asserting jurisdiction over civil claims solely dependent on interpretation of religious scripture or doctrine. *See Milivojevich*, 426 U.S. at 709 (resolution of property dispute depended on resolution of religious dispute over bishop's defrockment); *Rohrbaugh*, 79 Wn.2d at 373.

Essentially, ecclesiastical abstention serves the constitutional purpose of maintaining separation of church and state, as well as the practical purpose of leaving interpretation of ecclesiastical law to the expert ecclesiastical authorities. *Watson*, 80 U.S. at 728-29. But this abstention does not, as the *Watson* and *Milivojevich* courts noted, apply in all circumstances.

Here, Erdman's claims against Toone and the Church involve prima facie elements of civil tort law, not ecclesiastical law.[11] Accordingly, we review each of Erdman's claims to determine whether the trial court properly granted summary judgment.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Erdman contends that the trial court erred in dismissing her claims for negligent infliction of emotional distress against the Church.[12] We disagree.

As our Supreme Court has recognized,

> "[t]he utility of permitting employers to handle workplace disputes outweighs the risk of harm to employees who may exhibit symptoms of emotional distress as a result. The employers, not the courts, are in the best position to determine whether such [workplace] disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all. While such actions undoubtedly are stressful to impacted employees, the courts cannot guarantee a stress-free workplace."

Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 245, 35 P.3d 1158 (2001) (quoting *Bishop v. State*, 77 Wn. App. 228, 234, 889 P.2d 959 (1995)). Therefore, employer disciplinary decisions in workplace personality disputes may not result in liability for negligent infliction of emotional distress. *Snyder*, 145 Wn.2d at 245-46.

Here, the Session Committee investigated a dispute between Erdman and Toone. The Session Committee ultimately recommended termination based on the evaluation of her actions. Such an employment decision does not give rise to a negligent infliction claim against the Church. Therefore, the trial court properly dismissed Erdman's claims against the Church.

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[11] We recognize Toone and the Church may have possible defenses under the Free Exercise and Establishment Clauses.

[12] As we already described, Erdman also voluntarily dismissed her negligent infliction of emotional distress claims based on facts not raised in her Form No. 26 grievance.

Erdman further contends that the trial court erred in dismissing her claims for Toone's negligent infliction of emotional distress based on his abusive behavior toward her. We agree.

As we discussed above, the ecclesiastical abstention doctrine did not bar such a claim against him. Here, this claim survives summary judgment.

NEGLIGENT SUPERVISION AND RETENTION

Erdman further contends that the trial court erred in dismissing her negligent retention and supervision claims against the Church based on its alleged failure to take action against its employee for inappropriate behavior and harassment. In analyzing her argument, we must determine whether allowing such a claim to proceed would violate the Free Exercise and Establishment Clauses of the First Amendment.[13]

State action, when applied to a church's religiously motivated activities, raises concerns under the First Amendment. *Paul v. Watchtower Bible and Tract Soc'y of New York, Inc.*, 819 F.2d 875, 880 (9th Cir. 1987). The application of state laws, including common law tort rules, constitutes state action. *Paul*, 819 F.2d at 880. For example, the Free Exercise Clause prevents civil courts from intruding into ecclesiastical matters or interfering with governance of church affairs. *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999).

Similarly, the Establishment Clause prohibits " 'excessive government entanglement with religion.' " *Bollard*, 196 F.3d at 948 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)). Entanglement can take both substantive and procedural forms. *Bollard*, 196 F.3d at 948-49. Substantive entanglement can result, for example, from a civil court placing itself in the position of evaluating " 'competing opinions on religious subjects.' "

[13] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend I, cl. 1.

Bollard, 196 F.3d at 949 (quoting *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996)). Procedural entanglement can result from "a protracted legal process pitting church and state as adversaries," especially when it would subject a church to "the full panoply of legal process designed to probe the mind of the church" in making religiously motivated decisions. *Bollard*, 196 F.3d at 949 (quoting *Rayburn*, 772 F.2d at 1171). The greatest risk of procedural entanglement exists when a substantive entanglement is at issue. *Bollard*, 196 F.3d at 949.

The Washington Supreme Court has stated that, in general, "[t]he First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles." *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 728, 985 P.2d 262 (1999).

In *C.J.C.*, for example, the court concluded that, under the circumstances, a church could owe a duty of reasonable care to prevent harm intentionally inflicted on children by a church worker. 138 Wn.2d at 720, 727-28. Likewise, as the Ninth Circuit observed, a "generalized and diffuse concern for church autonomy, without more," did not bar imposing tortious liability on a church for sexual harassment perpetuated by a minister against another employee. *Bollard*, 196 F.3d at 948.

The Ninth Circuit offers an instructive analysis in *Bollard*. In its Free Exercise Clause analysis, it noted that, because the defendant condemned the sexual harassment alleged by the plaintiff as inconsistent with its beliefs, allowing the suit to proceed would not significantly impact its religious beliefs or doctrines. *Bollard*, 196 F.3d at 947. Further, it noted that the Free

Exercise Clause ministerial exception did not apply even when a minister was the perpetrator of harassment because "the [defendant] most certainly [did] not claim that allowing harassment to continue unrectified is a method of choosing [its] clergy."[14] *Bollard*, 196 F.3d at 947.

Likewise, in its Establishment Clause analysis, the *Bollard* court reasoned that substantive entanglement was not at issue based on its Free Exercise Clause analysis. 196 F.3d at 949. And it reasoned that allowing the suit to proceed would involve only a limited inquiry into "the nature and severity of the harassment and what measures, if any, were taken by the Jesuits" to exercise reasonable care to prevent or correct it. *Bollard*, 196 F.3d at 950. Thus, it required the jury to make only secular judgments, not evaluate religious doctrine or the reasonableness of the [defendant's] religious practices. *Bollard*, 196 F.3d at 950. Therefore, it concluded that the procedural entanglement in allowing the suit to proceed did not rise to a level violating the Establishment Clause. *Bollard*, 196 F.3d at 950.

Analyzing this case under *Bollard*, we first note that the church has not offered a religious justification for Toone's alleged tortious acts. Instead, it has denied that any misconduct occurred and argues that both the ministerial exception and ecclesiastical abstention

[14] In *Bollard*, the Ninth Circuit Court of Appeals applied the balancing test articulated in *Sherbert v. Verner*, 374 U.S. 398, 403-07, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), to its Free Exercise Clause analysis. *Bollard*, 196 F.3d at 946. The United States Supreme Court clarified in *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), that the *Sherbert* balancing test does not apply to general prohibitions of socially harmful conduct and held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507, 513-14, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). It appears, then, that the *Smith* test is more permissive than the previous test for evaluating the lawfulness of state action under the Free Exercise Clause. Because the Ninth Circuit concluded in *Bollard* that, under a stricter test, imposing tortious liability for sexual harassment committed by one of its ministers against a employee did not violate the Free Exercise Clause, the shift to a more permissive test still supports its holding. 196 F.3d at 947-48.

bar consideration of Erdman's claims. Second, in its employee handbook, the Church specifically recognizes its prohibition against sexual harassment. Third, the Church's Book of Order states that the Session possesses responsibility "to provide for the administration of the program of the church, including . . . fair employment practices." CP at 831. Thus, the Church's employment policies and church doctrine prohibit sexual harassment. Fourth, Erdman's negligent supervision and retention claims and the Church's potential defenses involve a limited, secular inquiry similar to the plaintiff's claims and potential defenses under *Bollard*.[15]

The First Amendment does not bar Erdman's negligent supervision and retention claims against the Church.[16] Thus, we remand for further proceedings.

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[15] In *Bollard*, the Ninth Circuit also noted that, because the plaintiff sought damages as his sole remedy, there was no danger of a remedy requiring continuing court action that would result in excessive entanglement with religion. 196 F.3d at 950. Here, Erdman also sought injunctive relief based only on the Church's discriminatory employment practices. We caution the trial court that should any of Erdman's claims prevail on remand, such injunctive relief would likely violate the Establishment Clause.

[16] In its amicus brief, the Presbytery cites *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 980 P.2d 809 (1999), contending that a secular court's review of these claims would result in impermissible government entanglement with religion in violation of the Establishment Clause. Amicus Br. at 9. In *Germain*, Division Three, specifically noting that it was not deciding "whether the First Amendment forecloses *all* negligent supervision claims against churches based on the conduct of their ministers," held that "[t]he determination of whether to impose liability on a church where [the entire congregation held authority to terminate its pastor] would require the court to consider and interpret the church's laws and constitution," thus violating the First Amendment. *Germain*, 96 Wn. App. at 836, 837). Even assuming we agreed with the reasoning in *Germain*, the record in this case does not indicate that the church's congregation possesses such diffuse authority to terminate the pastor. Therefore, here *Germain* does not apply.

The Presbytery also contends that review of Erdman's claims would violate the greater protection afforded religious beliefs and practices under article I, section 11 of the Washington state constitution. But our Supreme Court has noted in the context of an article I, section 11 case that if a party does not provide constitutional analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), then appellate courts will not analyze separate state constitutional grounds in a case. *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 151, 995 P.2d 33 (2000).

TITLE VII CLAIMS

Erdman also argues that the trial court erred in dismissing her federal Title VII claims. She raised Title VII claims of discrimination, harassment, hostile work environment, and retaliation based on her gender and her religious beliefs.

We initially note that Title VII allows religious employers to discriminate based on religion. *See* 42 U.S.C. § 2000(e)-1(a). Thus, Erdman's Title VII claims based on religious discrimination or harassment fail as a matter of law.

Nevertheless, her other Title VII claims do not fail. As the *Bollard* court held that the First Amendment did not bar the plaintiff's Title VII claims based on sexual harassment, they are similarly not barred here. 196 F.3d at 948, 950. Likewise, the Ninth Circuit has held that the First Amendment does not bar Title VII gender discrimination claims against religious employers that prohibit such discrimination, and it does not bar retaliation claims brought by non-ministerial employees. *Equal Employment Opportunity Comm'n v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1279, 1281 (9th Cir. 1982). Therefore, we remand for further proceedings.

WASHINGTON LAW AGAINST DISCRIMINATION

Erdman further contends that the trial court erred in dismissing her claims under the WLAD due to its non-profit religious employer exemption, RCW 49.60.040(11). She also asserts that the statute is unconstitutional. We begin with the constitutionality argument.

It further stated that a *Gunwall* analysis is still required, even when on-point case law exists where the legal principles are not firmly established. *Open Door Baptist Church*, 140 Wn.2d at 151 n.6. Here, the Presbytery did not conduct an article I, section 11 analysis and this case presents unsettled legal principles. Therefore, we do not further discuss its article I, section 11 argument.

We presume the constitutionality of RCW 49.60.040(11), which exempts non-profit religious employers from the WLAD. *See City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2009). The statute provides:

> "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

RCW 49.60.040(11).

Erdman raises two constitutional arguments. First, she asserts that the statute violates article I, section 12, the privileges and immunities clause of the Washington Constitution. Second, she asserts that the statute violates the equal protection clause of the federal constitution.

Initially, we note that Erdman cites no relevant authority regarding her article I, section 12 argument. She cites three cases: *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280 n.9, 285, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985), *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 813, 83 P.3d 419 (2004), and *Duranceau v. City of Tacoma*, 27 Wn. App. 777, 620 P.2d 533 (1980). *Piper* and *Grant County* establish only the existence of a fundamental right to pursue an occupation. Furthermore, our Supreme Court also has rejected the applicability of *Duranceau* and the proposition that the religious employer exemption is governmental interference with the fundamental right to pursue an occupation in violation of article I, section 12. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 680-81, 807 P.2d 830 (1991). Thus, we do not further discuss this argument. RAP 10.3(a)(6).

Likewise, in *Farnam*, our Supreme Court noted that it has often considered the Washington constitution's privileges and immunities clause and the federal constitution's equal protection clause as one issue. 116 Wn.2d at 681. It observed that the United States Supreme

Court reviewed and upheld the federal counterpart to Washington's religious employer exemption under a rational basis standard because the exemption created employer classes based on religion and provided a "uniform benefit to *all* religions" rationally related to the "legitimate governmental purpose" of prohibiting significant government interference with the free exercise of religion. *Farnam*, 116 Wn.2d at 681 (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987)). Thus, we may infer from our Supreme Court's observations in *Farnam* that the WLAD's religious employer exemption would be subject to and would survive a rational basis review under the federal equal protection clause. Having rejected Erdman's constitutional arguments, we turn to reviewing the statute's application.

Erdman brought claims against the Church under the WLAD based on sexual and religious harassment and retaliation for reporting this harassment. She also brought common law claims based on wrongful termination and discharge and retaliation for reporting this harassment and her belief that Toone's actions violated tax laws.[17] The plain language of RCW

[17] RCW 49.60.180 provides:

> It is an unfair practice for any employer:
>
> . . . .
>
> (3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability

RCW 49.60.180 was amended in 2006 and 2007. For purposes of this opinion, those changes do not affect our analysis.

RCW 49.60.210(1) prohibits employers from discharging employees who oppose practices prohibited by chapter 49.60 RCW.

49.60.040(11) bars her harassment and wrongful discharge claims under the WLAD and the trial court properly dismissed them.

Furthermore, Erdman's common law claims for retaliation,[18] wrongful termination, and wrongful discharge fall under the tort of wrongful discharge in violation of public policy. Claimants must demonstrate the existence of a clearly mandated public policy as part of establishing a wrongful discharge claim. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). Here, public policy specifically exempts non-profit religious employers from the WLAD. The parties do not dispute that the Church is a non-profit religious employer. Moreover, article I, section 11 of the Washington Constitution embodies this state's public policy of absolutely protecting "freedom of conscience in all matters of religious sentiment, belief and worship." The Church asserts that it fired Erdman for scripture violations. Thus, the trial court properly dismissed Erdman's common law employment claims based on reporting Toone's harassment.

CONCLUSION

We affirm the trial court's discovery rulings. We further affirm the trial court's order granting summary judgment and dismissing Erdman's common law claims against the Church

[18] Erdman argues that the Church retaliated against her by discharging her for "whistleblowing" regarding the possible negative tax consequences for Toone's tours. She fails to meet the standard that requires her to identify the specific public policy. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002) (claimant must demonstrate the existence of a clearly mandated public policy).

Erdman also appears to have pleaded a claim for common law retaliation in violation of public policy. Because we have considered this tort as a single, common law tort of "retaliation and wrongful discharge in violation of public policy," we do not analyze it separately. *See Jenkins v. Palmer*, 116 Wn. App. 671, 677, 66 P.3d 1119 (2003).

for negligent infliction of emotional distress, wrongful discharge, retaliation, and wrongful termination in violation of public policy.

We also affirm the trial court's order granting summary judgment and dismissing Erdman's WLAD claims for harassment and wrongful discharge.

We reverse the trial court's grant of summary judgment on her negligent infliction of emotional distress claim against Toone.

We hold that the ecclesiastical abstention doctrine does not bar Erdman's remaining claims. Thus, we reverse the trial court's order granting summary judgment on that basis.

We further hold that the First Amendment does not bar her negligent supervision and retention and Title VII claims against the Church and, therefore, we reverse the trial court's order granting summary judgment on that basis.

Affirmed in part, reversed in part, and remanded for further proceedings.[19]

Houghton, J.P.T.

We concur:

Armstrong, J.

Penoyar, C.J.

[19]As we noted, Erdman did not appeal the trial court's dismissal of her intentional infliction of emotional distress claim and she voluntarily dismissed the portions of her retaliation, negligent infliction of emotional distress, and willful withholding of wages claims that were not based on facts raised in her Form No. 26 grievance.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ANGELA ERDMAN, Appellant, v. CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE, individually; and the marital community of MARK J. TOONE and JANE DOE TOONE, Respondents.	No. 40247-5-II ORDER AMENDING OPINION AND DENYING MOTION FOR RECONSIDERATION

Respondents have moved this court for reconsideration of its opinion filed on June 29, 2010. This court amends the opinion as follows: On pages 14 and 15 of the slip opinion, the following paragraph is deleted:

> The Ninth Circuit offers an instructive analysis in *Bollard*. In its Free Exercise Clause analysis, it noted that, because the defendant condemned the sexual harassment alleged by the plaintiff as inconsistent with its beliefs, allowing the suit to proceed would not significantly impact its religious beliefs or doctrines. *Bollard*, 196 F.3d at 947. Further, it noted that the Free Exercise Clause ministerial exception did not apply even when a minister was the perpetrator of harassment because "the [defendant] most certainly [did] not claim that allowing harassment to continue unrectified is a method of choosing [its] clergy."[14] *Bollard*, 196 F.3d at 947.

And the following paragraph is substituted:

> The Ninth Circuit offers an instructive analysis in *Bollard*. In its Free Exercise Clause analysis, it noted that, because the defendant condemned the sexual harassment alleged by the plaintiff as inconsistent with its beliefs, allowing the suit to proceed would not significantly impact its religious beliefs or doctrines.[14] *Bollard*, 196 F.3d at 947. Further, it noted that the Free Exercise Clause ministerial exception did not apply even when a minister was the

perpetrator of harassment because "the [defendant] most certainly [did] not claim that allowing harassment to continue unrectified is a method of choosing [its] clergy."[15] *Bollard*, 196 F.3d at 947.

[15] As the Ninth Circuit observed, "The Free Exercise Clause rationale for protecting a church's personnel decisions concerning its ministers is the necessity of allowing the church to choose its representatives using whatever criteria it deems relevant." *Bollard*, 196 F.3d at 947. Because no protected-choice rationale was present under the circumstances, allowing the plaintiff's claims to proceed did not intrude on church autonomy any more than "allowing parishioners' civil suits against a church for the negligent supervision of ministers who have subjected them to inappropriate sexual behavior." *Bollard*, 196 F.3d at 947-48.

Because a footnote was added in the above substituted paragraph, all subsequent footnotes throughout the opinion are renumbered accordingly.

On page 17 of the slip opinion, the following paragraph is deleted:

> We initially note that Title VII allows religious employers to discriminate based on religion. *See* 42 U.S.C. § 2000(e)-1(a). Thus, Erdman's Title VII claims based on religious discrimination or harassment fail as a matter of law.

And the following paragraph is substituted:

> We initially note that Title VII allows religious employers to discriminate based on religion. *See* 42 U.S.C. § 2000(e)-1(a). Further, there is no individual liability under Title VII. *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 (9th Cir. 2003). Thus, Erdman's Title VII claims based on religious discrimination or harassment and her Title VII claims against Toone fail as a matter of law.

On page 17 of the slip opinion, the following paragraph is deleted:

> Nevertheless, her other Title VII claims do not fail. As the *Bollard* court held that the First Amendment did not bar the plaintiff's Title VII claims based on sexual harassment, they are similarly not barred here. 196 F.3d at 948, 950. Likewise, the Ninth Circuit has held that the First Amendment does not bar Title VII gender discrimination claims against religious employers that prohibit such discrimination, and it does not bar retaliation claims brought by non-ministerial employees. *Equal Employment Opportunity Comm'n v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1279, 1281 (9th Cir. 1982). Therefore, we remand for further proceedings.

And the following paragraph is substituted:

> Nevertheless, her other Title VII claims against the Church do not fail. As the *Bollard* court held that the First Amendment did not bar the plaintiff's Title VII claims based on sexual harassment, they are similarly not barred here. 196 F.3d at 948, 950. Likewise, the Ninth Circuit has held that the First Amendment does not bar Title VII gender discrimination claims against religious employers that prohibit such discrimination, and it does not bar retaliation claims brought by non-ministerial employees. *Equal Employment Opportunity Comm'n v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1279, 1281 (9th Cir. 1982), *abrogated as recognized by American Friends Service Committee Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1986).[18] Therefore, we remand for further proceedings.
>
> [18] *See* footnote 14.

On page 20 of the slip opinion, the following paragraph is deleted:

> Furthermore, Erdman's common law claims for retaliation,[18] wrongful termination, and wrongful discharge fall under the tort of wrongful discharge in violation of public policy. Claimants must demonstrate the existence of a clearly mandated public policy as part of establishing a wrongful discharge claim. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). Here, public policy specifically exempts non-profit religious employers from the WLAD. The parties do not dispute that the Church is a non-profit religious employer. Moreover, article I, section 11 of the Washington Constitution embodies this state's public policy of absolutely protecting "freedom of conscience in all matters of religious sentiment, belief and worship." The Church asserts that it fired Erdman for scripture violations. Thus, the trial court properly dismissed Erdman's common law employment claims based on reporting Toone's harassment.

And the following paragraph is substituted:

> Furthermore, Erdman's common law claims for retaliation,[20] wrongful termination, and wrongful discharge fall under the tort of wrongful discharge in violation of public policy. Claimants must demonstrate the existence of a clearly mandated public policy as part of establishing a wrongful discharge claim. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). Article I, section 11 of the Washington Constitution embodies this state's public policy of absolutely protecting "freedom of conscience in all matters of religious sentiment, belief and worship." The Church asserts that it fired Erdman for scripture violations. Thus, the trial court properly dismissed Erdman's common law employment claims based on reporting Toone's harassment.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the motion for reconsideration is denied.

Dated this 28TH day of July, 2008.

PANEL: ARMSTRONG, PENOYAR, HOUGHTON, J.P.T.

FOR THE COURT:

CHIEF JUDGE

APPENDIX C

234 P.3d 299, 109 Fair Empl.Prac.Cas. (BNA) 1419
(Cite as: 234 P.3d 299)

Court of Appeals of Washington,
Division 2.
Angela ERDMAN, Appellant,
v.
CHAPEL HILL PRESBYTERIAN CHURCH; Mark J. Toone, individually; and the marital community of Mark J. Toone and Jane Doe Toone, Respondents.
No. 40247-5-II.

June 29, 2010.
As Amended on Denial of Reconsideration July 28, 2010.

Background: Former church employee brought action against church and church pastor, alleging, inter alia, wrongful termination, retaliation, and sexual and religious discrimination. The Superior Court, Pierce County, Lisa R. Worswick, J., granted summary judgment motions of church and pastor. Former employee appealed.

Holdings: The Court of Appeals, Houghton, J. Pro Tem., held that:
(1) church was not liable to former employee for negligent infliction of emotional distress;
(2) claim for negligent infliction of emotional distress against pastor was not barred by ecclesiastical abstention doctrine;
(3) claims for negligent retention and supervision were not barred by ecclesiastical abstention doctrine;
(4) Title VII claims of hostile work environment and retaliation based on gender were not barred by First Amendment; and
(5) claims for harassment and retaliation were barred by Washington Law Against Discrimination (WLAD).

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Constitutional Law 92 1340(2)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1340 Clergy; Ministers
92k1340(2) k. Ministerial exception in general. Most Cited Cases
The "ministerial exception," precluding civil court review of disputes involving relationships between churches and ministers, derives from the Free Exercise and Establishment Clauses of the First Amendment, and serves to protect the relationship between religious organizations and their ministers from unconstitutional government interference. U.S.C.A. Const.Amend. 1.

[2] Religious Societies 332 14

332 Religious Societies
332k14 k. Judicial supervision in general. Most Cited Cases
The "ministerial exception," precluding civil court review of disputes involving relationships between churches and ministers, does not apply to employees of a religious institution if they are not serving in a ministerial capacity.

[3] Religious Societies 332 14

332 Religious Societies
332k14 k. Judicial supervision in general. Most Cited Cases
The "ecclesiastical abstention doctrine" applies and bars civil court jurisdiction where the character of the dispute's subject matter is purely ecclesiastical.

[4] Appeal and Error 30 635(1)

30 Appeal and Error
30X Record
30X(J) Defects, Objections, Amendments, and Corrections
30k635 Effect of Omissions
30k635(1) k. In general. Most Cited Cases

Appeal and Error 30 1079

30 Appeal and Error
30XVI Review

234 P.3d 299, 109 Fair Empl.Prac.Cas. (BNA) 1419
(Cite as: 234 P.3d 299)

30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient discussion of objections. Most Cited Cases
Former church employee waived on appeal argument that trial court erred by excluding documents of church's investigative committee that were reviewed in camera and by partially relying on such documents in granting summary judgment motions of church and pastor, in former employee's action against church and pastor arising out of former employee's termination, where former employee failed to provide authority supporting her argument and failed to secure such documents for appellate review. RAP 9.2(b), 10.3(a)(6).

[5] Constitutional Law 92 ⚿1340(1)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1340 Clergy; Ministers
92k1340(1) k. In general. Most Cited Cases

Pretrial Procedure 307A ⚿172

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)4 Scope of Examination
307Ak172 k. Grounds of claim or defense. Most Cited Cases
Trial court properly foreclosed inquiry during discovery into thought processes of church's investigative committee regarding its investigation into former church employee's claims against pastor, by limiting discovery through deposition testimony in former employee's action against church and pastor arising out of her termination based on alleged scripture violations, as such inquiry would have created impermissible governmental entanglement with church under First Amendment. U.S.C.A. Const.Amend. 1.

[6] Religious Societies 332 ⚿14

332 Religious Societies
332k14 k. Judicial supervision in general. Most Cited Cases
Washington courts abstain from asserting jurisdiction over civil claims solely dependent on interpretation of religious scripture or doctrine.

[7] Damages 115 ⚿57.58

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.50 Labor and Employment
115k57.58 k. Other particular cases. Most Cited Cases
Church was not liable to former church employee for negligent infliction of emotional distress based on its investigation of dispute between former employee and church pastor and its subsequent termination of former employee.

[8] Damages 115 ⚿57.51

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.50 Labor and Employment
115k57.51 k. In general. Most Cited Cases
Employer disciplinary decisions in workplace personality disputes may not result in liability for negligent infliction of emotional distress.

[9] Religious Societies 332 ⚿30

332 Religious Societies
332k30 k. Torts. Most Cited Cases
Former church employee's claim for negligent infliction of emotional distress against church pastor based on pastor's alleged abusive behavior toward former employee was not barred by ecclesiastical abstention doctrine under First Amendment; claim involved prima facie elements of civil tort law rather than ecclesiastical law. U.S.C.A. Const.Amend. 1.

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[10] Constitutional Law 92 ⚿1340(1)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1340 Clergy; Ministers
92k1340(1) k. In general. Most Cited Cases

Religious Societies 332 ⚿30

332 Religious Societies
332k30 k. Torts. Most Cited Cases
Former church employee's claims against church for negligent retention and supervision, based on church's alleged failure to take action against church pastor for his alleged inappropriate behavior and harassment towards former employee, was not barred by ecclesiastical abstention doctrine under First Amendment, where church did not offer religious justification for pastor's alleged acts, church employee handbook prohibited harassment, and church had responsibility by its own rules to provide fair employment practices. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⚿1300

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1300 k. Entanglement. Most Cited Cases
The Establishment Clause prohibits excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⚿1300

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1300 k. Entanglement. Most Cited Cases
Government entanglement with religion in violation of the Establishment Clause can take both substantive and procedural forms. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ⚿1300

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1300 k. Entanglement. Most Cited Cases
The greatest risk of procedural governmental entanglement with religion, in violation of the Establishment Clause, exists when a substantive entanglement is at issue. U.S.C.A. Const.Amend. 1.

[14] Civil Rights 78 ⚿1114

78 Civil Rights
78II Employment Practices
78k1108 Employers and Employees Affected
78k1114 k. Exemptions. Most Cited Cases
Church and church pastor could not be liable to former church employee for religious discrimination and harassment under Title VII, inasmuch as church was religious employer. Civil Rights Act of 1964, § 702, 42 U.S.C.A. § 2000e-1(a).

[15] Civil Rights 78 ⚿1114

78 Civil Rights
78II Employment Practices
78k1108 Employers and Employees Affected
78k1114 k. Exemptions. Most Cited Cases

Constitutional Law 92 ⚿1339(2)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1339 Labor and Employment in General
92k1339(2) k. Discrimination. Most Cited Cases
Former church employee's Title VII claims of hostile work environment and retaliation based on her gender against church and church pastor were not barred by First Amendment. U.S.C.A. Const.Amend. 1; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

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[16] Appeal and Error 30 ⚿1079

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient discussion of objections. Most Cited Cases
Former church employee waived on appeal her argument that non-profit religious employer exemption in Washington Law Against Discrimination (WLAD) violated Privileges and Immunity Clause of State constitution, where former employee failed to cite to relevant authority regarding her argument. West's RCWA Const. Art. 1, § 12; RAP 10.3(a)(6).

[17] Civil Rights 78 ⚿1114

78 Civil Rights
78II Employment Practices
78k1108 Employers and Employees Affected
78k1114 k. Exemptions. Most Cited Cases
Former church employee's claims against church under Washington Law Against Discrimination (WLAD) based on alleged sexual and religious harassment and retaliation for reporting such harassment were barred by WLAD's non-profit religious employer exemption. West's RCWA 49.60.040(11).

[18] Constitutional Law 92 ⚿1339(1)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1339 Labor and Employment in General
92k1339(1) k. In general. Most Cited Cases

Religious Societies 332 ⚿14

332 Religious Societies
332k14 k. Judicial supervision in general. Most Cited Cases
Former church employee's common law claims against church for retaliation, wrongful termination, and wrongful discharge were barred by non-profit religious employer exemption in Washington Law Against Discrimination (WLAD), and by Free Exercise Clause in State constitution; church asserted that it terminated former employee for scripture violations. West's RCWA Const. Art. 1, § 11; West's RCWA 49.60.040(11).

***301** Robin Williams Phillips, Sean Vincent Small, Lasher Holzapfel Sperry & Ebberson PLLC, Seattle, WA, for Appellant.

Elizabeth Pike Martin, Gordon Thomas Honeywell et al., William A. Coats, Daniel C. Montopoli, Attorneys at Law, Tacoma, WA, for Respondents.

Elizabeth Pike Martin, Gordon Thomas Honeywell et al., Tacoma, WA, for Amicus Curiae on behalf of Presbytery of Olympia.

HOUGHTON, J.P.T.[FN1]

FN1. Judge Houghton is serving as judge pro tempore of the Court of Appeals, Division II under RCW 2.06.150.

¶ 1 Angela Erdman appeals the trial court's order dismissing her claims against Chapel Hill Presbyterian Church (Church) and its pastor, Mark Toone. She argues that the trial court erred in limiting discovery and in granting summary judgment. She also argues that RCW 49.60.040(11), the religious employer exemption under chapter 49.60 RCW, the Washington Law against Discrimination (WLAD), violates the state and federal constitutions. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

¶ 2 In 2003, Erdman became a Church elder. As an elder, she took ordination vows ***302** in which she agreed to the Church's dispute resolution and disciplinary procedures.

¶ 3 In 2005, the Church hired Erdman as its Executive for Stewardship. The Church's job description for this position sets forth duties such as assisting with the development of the Church's vision, goals, and strategies; providing strategic leadership; assisting with decisions about the Church's financial and development strategies and goals; and creating a major donor development plan for the Church. The position did not require candidates to be an elder or to belong to the

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Church.

¶ 4 According to Erdman, her job generally involved developing the Church's annual budget, including managing an accounting and finance team; managing a department "responsible for all "accounting, payroll, tax, pricing, and banking functions;" and providing business case analysis, reviews, reports, and income statements to the Church and its lenders. Clerk's Papers (CP) at 317. The Church did not authorize her to administer sacraments or to conduct religious services as part of her position.

¶ 5 This case arises from Erdman's belief that tours of religious and historical sites led by Toone, the Church's senior pastor, possibly jeopardized the Church's tax exempt status. In September 2007, Erdman asked Toone to discuss her concerns about the tours. He assured her that the tours comported with the Church's mission and that many clergy followed this common ministry practice. He told her that he had also read documents she supplied regarding the issue and had discussed the matter with his accountant, who advised that the tours did not threaten the Church's tax exempt status.

¶ 6 On October 16, 2007, Toone sent Erdman an email stating that discussions between his and the Church's accountant assured him that the tours were proper and that he wanted to "close the loop" on the issue. CP (filed Oct. 28, 2009) at 829. Erdman responded twice, requesting Toone meet with her to discuss the tours.

¶ 7 On October 17, Toone met with Erdman. According to her, Toone stormed into her office; slammed the door; and proceeded to harass, physically intimidate, and verbally abuse her for 25 minutes.[FN2] Toone told her that the tours were proper, that her continued questioning was insubordination, and that she had unfairly impugned his reputation. That same day, she notified the Church's human resource director that she would not return to work in the near future. She also submitted a written complaint against Toone to the Church's human resource director.[FN3] On October 29, she took formal medical leave.

FN2. According to the Church's human resources director, since 1996, 15 other female church employees had made complaints about Toone's behavior. She did not recall the specific details of those complaints because most of the women said they felt too threatened by Toone to file them in written form.

FN3. The Church's employee handbook specifically prohibits sexual harassment. Additionally, the Church's Book of Order (2007-2009) states that its Session possesses responsibility "to provide for the administration of the program of the church, including ... fair employment practices." CP at 831.

¶ 8 To resolve the dispute, Toone suspended all promotional activity for an upcoming tour and agreed to turn the matter over to the Church's governing body, the Session. A Session Committee, eventually comprising of five Church elders, met with Erdman to hear her concerns, review the tours, and address the interpersonal issues between her and Toone.

¶ 9 On November 30, Erdman contacted the Church, stating that her doctor had cleared her to return to work. The Church responded by placing her on administrative leave with pay, pending the Session Committee's investigation. In December, before the Session Committee completed its investigation, Erdman filed a grievance against Toone with the Presbytery of Olympia (Presbytery), the regional governing body of the Presbyterian Church. She based her grievance on her interpretation of the tour issue and on Toone's physical intimidation; verbal abuse; and threats about her job, including placing her on administrative leave.

¶ 10 On December 27, the Session Committee issued a report concluding that Toone ***303** properly conducted his tours and that he did not harass or intimidate Erdman. The Session Committee also concluded that Erdman's implied threats through her attorney, false statements, and dissemination of disparaging emails throughout the investigation violated her ordination vows and the Church's scriptural teachings. Based on the Session Committee's conclusions and recommendation, the Church terminated Erdman's employment on December 31.

¶ 11 In January 2008, Erdman resubmitted her grievance to the Presbytery using its proper Form No. 26. In her Form No. 26 grievance, she accused Toone of violating scripture and Church law in (1) leading the tours, (2) physically intimidating her, (3) verbally abusing and harassing her, and (4) retaliating against

her. Although in her Form No. 26 grievance, she did not set forth specific allegations against the Church, she claimed that Toone worked with the Session to prevent "full disclosure of truth" regarding the tours and that "significant portions" of the Session Committee's report bore "false witness and distortion of truth." CP (filed Oct. 28, 2009) at 845-46.

¶ 12 In response to Erdman's Form No. 26 grievance, the Presbytery appointed an Investigative Committee. After reviewing the matter, the Investigative Committee concluded that Erdman could not substantiate her allegations and declined to "fil[e] charges" against Toone. CP (filed Oct. 28, 2009) at 848. The Presbyterian Church's Book of Order (2007-2009) reserved Erdman's right to appeal the Investigative Committee's decision.

¶ 13 Erdman did not appeal. Instead, she sued Toone [FN4] and the Church. Toone and the Church moved for summary judgment. In response, Erdman amended her complaint, raising state law claims based on (1) negligent retention, (2) negligent supervision, (3) violations of the WLAD, (4) intentional infliction of emotional distress, (5) negligent infliction of emotional distress, (6) wrongful discharge, (7) wrongful termination in violation of public policy, (8) retaliation, and (9) wrongful withholding of wages. Her amended complaint also raised federal law claims under Title VII of the Civil Rights Act of 1964 based on (1) religious and sexual discrimination, (2) harassment, (3) hostile work environment, and (4) retaliation. 42 U.S.C. § 2000e-2(a)(1).

FN4. Although Erdman sued Mark and Jane Doe Toone, for clarity we refer to Mark Toone's actions in this opinion.

¶ 14 Before the trial court ruled on the summary judgment motion, Erdman moved to compel the deposition of an Investigative Committee member and production of that Committee's investigation documents. The Church, Toone, and the Presbytery objected, arguing that granting the motions to compel would interfere with the Church's constitutionally protected authority to resolve Church discipline matters in ecclesiastical tribunals.[FN5]

FN5. The Presbytery made a special appearance below for purposes of objecting to a subpoena Erdman sought to enforce against it. It was not a party below. It has submitted an amicus curiae brief on appeal.

¶ 15 The trial court reviewed the Investigative Committee's documents in camera.[FN6] It found that the First Amendment protected the Investigative Committee's thought processes contained in the documents and that Erdman had failed to demonstrate the required necessity for discovery. Although the trial court denied Erdman's motion to compel production of the documents, it granted her motion to compel the deposition of an Investigative Committee member. In doing so, it noted that no inquiry could be made into the Investigative Committee's thought processes. The trial court also found that the documents established that the Investigative Committee had considered each of Erdman's Form No. 26 grievance allegations.

FN6. The record before us does not disclose what the trial court reviewed. The better practice for trial counsel would have been to move to seal the documents the trial court reviewed in camera, thus allowing for consideration on appeal.

[1][2] ¶ 16 After the deposition was taken, the Church and Toone renewed their motion for summary judgment. They argued that Erdman was a pastor and the ministerial ***304** exception [FN7] applied depriving the trial court of jurisdiction to resolve disputes involving the relationship between the Church and its ministers. They further argued that the WLAD exempts religious organizations from its prohibitions.

FN7. The ministerial exception, precluding civil court review, derives from the Free Exercise and Establishment Clauses of the First Amendment. It serves to protect the relationship between religious organizations and their ministers from unconstitutional government interference. *Bollard v. Cal. Province of the Soc'y of Jesus,* 196 F.3d 940, 945 (9th Cir.1999). But the exception does not apply to employees of a religious institution if they are not serving in a ministerial capacity. *Bollard,* 196 F.3d at 947. In *Alcazar v. Corp. of the Catholic Archbishop,* 598 F.3d 668, 676 (9th Cir.2010), the Ninth Circuit sets forth a three-part test for determining whether the exception applies.

¶ 17 After hearing argument, the trial court stated that it lacked sufficient facts to decide whether Erdman was a minister and declined to rule in the defendant's favor on the ministerial exception.[FN8] It further dismissed Erdman's intentional infliction of emotional distress (outrage) claims because she failed to meet the relevant legal standards.

> FN8. Neither the record before the trial court nor before us adequately demonstrates that Erdman's claims would fail under the ministerial exception. Therefore, on remand, the trial court may consider this exception as further fleshed out by the parties.

[3] ¶ 18 Relying on the Division One decision in *Elvig v. Ackles,* 123 Wash.App. 491, 98 P.3d 524 (2004), the trial court also addressed the viability of certain claims under the ecclesiastical abstention doctrine.[FN9] It dismissed all claims that were based on facts that had been set forth in Erdman's Form No. 26 grievance. The trial court stated that "the decisions made by the [ecclesiastical] tribunal and the matters decided by the tribunal, claims based on those facts are barred." Verbatim Transcript of Proceedings at 25.

> FN9. The ecclesiastical abstention doctrine applies and bars civil court jurisdiction where the character of the dispute's subject matter is purely ecclesiastical. *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 733, 20 L.Ed. 666 (1871).

¶ 19 As a result, the trial court dismissed Erdman's negligent retention, negligent supervision, wrongful discharge, wrongful termination in violation of public policy, retaliation, negligent infliction of emotional distress, and federal law claims that were based on facts set forth in the grievance. It declined to dismiss her retaliation, negligent infliction of emotional distress, and willful withholding of wages claims that were not based on facts raised in her Form No. 26 grievance.

¶ 20 After Erdman voluntarily dismissed her remaining claims, she sought direct review in our Supreme Court. That court declined review and transferred the matter to us.

ANALYSIS

Motions to Compel Discovery

[4] ¶ 21 Erdman first contends that the trial court erred in denying her motion to compel production of documents. She also appeals its limitations on deposition questioning of an Investigative Committee member.

¶ 22 We review a trial court's discovery rulings under an abuse of discretion standard. *T.S. v. Boy Scouts of Am.,* 157 Wash.2d 416, 423, 138 P.3d 1053 (2006). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *T.S.,* 157 Wash.2d at 423, 138 P.3d 1053.

¶ 23 Without citation to authority or to a record, Erdman argues that the trial court erred by excluding Investigative Committee documents reviewed in camera from discovery and by partially relying on those documents in granting summary judgment. We will not review this claimed error because Erdman failed to provide authority supporting her argument or to secure these documents for our review. *See* RAP 9.2(b) (appellant bears the burden of perfecting the record so that the reviewing court has before it all of the evidence relevant to the issue and matters not in the record will not be considered); RAP 10.3(a)(6) (parties must provide citation to authority supporting their arguments).

***305** [5] ¶ 24 Erdman also argues that the trial court improperly limited discovery through deposition testimony. We disagree.

¶ 25 The trial court foreclosed inquiry into the Investigative Committee's thought processes during discovery. We note that Erdman based her claims before the Committee entirely on scripture violations. Because inquiries into "the mind of the church" create an unconstitutional governmental entanglement with the church, the trial court did not abuse its discretion and Erdman's argument fails. *Rayburn v. Gen. Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1171 (4th Cir.1985) (subjecting church decisions involving spiritual functions to the "full panoply of legal process" violates the First Amendment).

Ecclesiastical Abstention

¶ 26 Erdman next contends that the trial court erred in

granting partial summary judgment based on ecclesiastical abstention. She asserts that it should not have dismissed her claims that were based on facts set forth in the Form No. 26 grievance because her claims involve secular issues and thus the Investigative Committee's decision does not bind civil courts.

¶ 27 We review an order granting summary judgment de novo. *Campbell v. Ticor Title Ins. Co.,* 166 Wash.2d 466, 470, 209 P.3d 859 (2009). When reviewing a summary judgment order, we take the evidence in a light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.,* 108 Wash.2d 162, 170, 736 P.2d 249 (1987). A trial court properly grants summary judgment when no genuine issues of material fact preclude it. CR 56(c).

¶ 28 The trial court relied on Division One's *Elvig* opinion, 123 Wash.App. at 491, 98 P.3d 524, as authority compelling it to dismiss all of Erdman's claims.[FN10] In *Elvig,* an associate minister filed sexual misconduct complaints with the church about its pastor. *Elvig,* 123 Wash.App. at 493-94, 98 P.3d 524. An investigative committee conducted an inquiry and decided not to act against the pastor. *Elvig,* 123 Wash.App. at 494, 98 P.3d 524. Elvig appealed to the Permanent Judicial Commission, the Presbytery's highest adjudicatory body, and it affirmed the decision. *Elvig,* 123 Wash.App. at 494, 98 P.3d 524. Elvig then brought numerous claims, including sexual harassment, retaliation, and negligent supervision against the church and its pastor in civil court. *Elvig,* 123 Wash.App. at 495, 98 P.3d 524. The trial court granted summary judgment in favor of the church and its pastor and dismissed all her claims except one, which she then voluntarily dismissed. *Elvig,* 123 Wash.App. at 495, 98 P.3d 524.

> FN10. Division One recently addressed the ecclesiastical abstention doctrine again in *Rentz v. Werner,* No. 62848-8-I, 2010 WL 2252529 (Wash.Ct.App. June 7, 2010). This case does not affect our analysis.

¶ 29 In affirming dismissal of Elvig's claims on appeal, Division One noted that

> if the church accused of wrongdoing is a member of a hierarchically-organized church that has ecclesiastical judicial tribunals, civil courts must defer to the highest church tribunal's resolution of the matter, despite the fact that the dispute could be resolved by a civil court.

Elvig, 123 Wash.App. at 496, 98 P.3d 524. It further stated:

> [A] civil court may adjudicate Elvig's claims only if: (1) liability would be based on secular conduct and would not require the court to interpret church doctrine or religious beliefs; (2) an ecclesiastical tribunal of a hierarchically-structured church has not already resolved the matter; and (3) Elvig's claims do not involve a church's ability to choose its ministers.

123 Wash.App. at 497, 98 P.3d 524 (footnote omitted). In setting forth this standard, the *Elvig* court relied on the United States Supreme Court decision in *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1871).

¶ 30 In *Watson,* the Supreme Court explained the rationale for the ecclesiastical abstention doctrine:

> As regards its use in the matters we have been discussing it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and ***306** punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said in a certain general sense very justly, that it was because the General Assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable.
>
> But it is a very different thing where a subject-matter of dispute, *strictly and purely ecclesiastical in its character,*-a matter over which the civil courts exercise no jurisdiction,-a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,-becomes the subject of its action.

80 U.S. at 732-33 (emphasis added).

[6] ¶ 31 Thus, the United States Supreme Court has interpreted the First Amendment to mandate that "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical [structure] on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law" but not necessarily as to matters that fall outside these parameters. *Serbian Eastern Orthodox Diocese for United States of Am. and Canada v. Milivojevich,* 426 U.S. 696, 713, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). Washington courts have adopted the same rule in the property dispute context. In *Presbytery of Seattle, Inc. v. Rohrbaugh,* 79 Wash.2d 367, 373, 485 P.2d 615 (1971), our Supreme Court stated:

> [W]here a right of property in an action before a civil court depends upon a question of doctrine, ecclesiastical law, rule or custom, or church government, and the question has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive.

Therefore, both federal and Washington courts abstain from asserting jurisdiction over civil claims solely dependent on interpretation of religious scripture or doctrine. *See Milivojevich,* 426 U.S. at 709, 96 S.Ct. 2372 (resolution of property dispute depended on resolution of religious dispute over bishop's defrockment); *Rohrbaugh,* 79 Wash.2d at 373, 485 P.2d 615.

¶ 32 Essentially, ecclesiastical abstention serves the constitutional purpose of maintaining separation of church and state, as well as the practical purpose of leaving interpretation of ecclesiastical law to the expert ecclesiastical authorities. *Watson,* 80 U.S. at 728-29. But this abstention does not, as the *Watson* and *Milivojevich* courts noted, apply in all circumstances.

¶ 33 Here, Erdman's claims against Toone and the Church involve prima facie elements of civil tort law, not ecclesiastical law.[FN11] Accordingly, we review each of Erdman's claims to determine whether the trial court properly granted summary judgment.

> FN11. We recognize Toone and the Church may have possible defenses under the Free Exercise and Establishment Clauses.

Negligent Infliction of Emotional Distress

[7] ¶ 34 Erdman contends that the trial court erred in dismissing her claims for negligent infliction of emotional distress against the Church.[FN12] We disagree.

> FN12. As we already described, Erdman also voluntarily dismissed her negligent infliction of emotional distress claims based on facts not raised in her Form No. 26 grievance.

[8] ¶ 35 As our Supreme Court has recognized,

> "[t]he utility of permitting employers to handle workplace disputes outweighs the risk of harm to employees who may exhibit symptoms of emotional distress as a result. The employers, not the courts, are in the best position to determine whether such [workplace] disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all. While ***307** such actions undoubtedly are stressful to impacted employees, the courts cannot guarantee a stress-free workplace."

Snyder v. Med. Serv. Corp., 145 Wash.2d 233, 245, 35 P.3d 1158 (2001) (quoting *Bishop v. State,* 77 Wash.App. 228, 234, 889 P.2d 959 (1995)). Therefore, employer disciplinary decisions in workplace personality disputes may not result in liability for negligent infliction of emotional distress. *Snyder,* 145 Wash.2d at 245-46, 35 P.3d 1158.

¶ 36 Here, the Session Committee investigated a dispute between Erdman and Toone. The Session Committee ultimately recommended termination based on the evaluation of her actions. Such an employment decision does not give rise to a negligent infliction claim against the Church. Therefore, the trial court properly dismissed Erdman's claims against the Church.

[9] ¶ 37 Erdman further contends that the trial court erred in dismissing her claims for Toone's negligent infliction of emotional distress based on his abusive behavior toward her. We agree.

¶ 38 As we discussed above, the ecclesiastical ab-

stention doctrine did not bar such a claim against him. Here, this claim survives summary judgment.

Negligent Supervision And Retention

[10] ¶ 39 Erdman further contends that the trial court erred in dismissing her negligent retention and supervision claims against the Church based on its alleged failure to take action against its employee for inappropriate behavior and harassment. In analyzing her argument, we must determine whether allowing such a claim to proceed would violate the Free Exercise and Establishment Clauses of the First Amendment.[FN13]

> FN13. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1.

¶ 40 State action, when applied to a church's religiously motivated activities, raises concerns under the First Amendment. *Paul v. Watchtower Bible and Tract Soc'y of New York, Inc.,* 819 F.2d 875, 880 (9th Cir.1987). The application of state laws, including common law tort rules, constitutes state action. *Paul,* 819 F.2d at 880. For example, the Free Exercise Clause prevents civil courts from intruding into ecclesiastical matters or interfering with governance of church affairs. *Bollard v. Cal. Province of the Soc'y of Jesus,* 196 F.3d 940, 947 (9th Cir.1999).

[11][12][13] ¶ 41 Similarly, the Establishment Clause prohibits " 'excessive government entanglement with religion.' " *Bollard,* 196 F.3d at 948 (quoting *Lemon v. Kurtzman,* 403 U.S. 602, 613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). Entanglement can take both substantive and procedural forms. *Bollard,* 196 F.3d at 948-49. Substantive entanglement can result, for example, from a civil court placing itself in the position of evaluating " 'competing opinions on religious subjects.' " *Bollard,* 196 F.3d at 949 (quoting *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.,* 83 F.3d 455, 465 (D.C.Cir.1996)). Procedural entanglement can result from "a protracted legal process pitting church and state as adversaries," especially when it would subject a church to "the full panoply of legal process designed to probe the mind of the church" in making religiously motivated decisions. *Bollard,* 196 F.3d at 949 (quoting *Rayburn,* 772 F.2d at 1171). The greatest risk of procedural entanglement exists when a substantive entanglement is at issue. *Bollard,* 196 F.3d at 949.

¶ 42 The Washington Supreme Court has stated that, in general, "[t]he First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles." *C.J.C. v. Corp. of the Catholic Bishop of Yakima,* 138 Wash.2d 699, 728, 985 P.2d 262 (1999).

¶ 43 In *C.J.C.,* for example, the court concluded that, under the circumstances, a church could owe a duty of reasonable care to prevent harm intentionally inflicted on children by a church worker. 138 Wash.2d ***308** at 720, 727-28, 985 P.2d 262. Likewise, as the Ninth Circuit observed, a "generalized and diffuse concern for church autonomy, without more," did not bar imposing tortious liability on a church for sexual harassment perpetuated by a minister against another employee. *Bollard,* 196 F.3d at 948.

¶ 44 The Ninth Circuit offers an instructive analysis in *Bollard.* In its Free Exercise Clause analysis, it noted that, because the defendant condemned the sexual harassment alleged by the plaintiff as inconsistent with its beliefs, allowing the suit to proceed would not significantly impact its religious beliefs or doctrines. *Bollard,* 196 F.3d at 947. Further, it noted that the Free Exercise Clause ministerial exception did not apply even when a minister was the perpetrator of harassment because "the [defendant] most certainly [did] not claim that allowing harassment to continue unrectified is a method of choosing [its] clergy." [FN14] *Bollard,* 196 F.3d at 947.

> FN14. As the Ninth Circuit observed, "The Free Exercise Clause rationale for protecting a church's personnel decisions concerning its ministers is the necessity of allowing the church to choose its representatives using whatever criteria it deems relevant. *Bollard,* 196 F.3d at 947. Because no protected-choice rationale was present under the circumstances, allowing the plaintiff's claims to proceed did not intrude on church autonomy any more than "allowing parishioners' civil suits against a church for the negligent supervision of ministers who have subjected them to inappropriate sexual behavior."

Bollard, 196 F.3d at 947-48.

¶ 45 Likewise, in its Establishment Clause analysis, the *Bollard* court reasoned that substantive entanglement was not at issue based on its Free Exercise Clause analysis. 196 F.3d at 949. And it reasoned that allowing the suit to proceed would involve only a limited inquiry into "the nature and severity of the harassment and what measures, if any, were taken by the Jesuits" to exercise reasonable care to prevent or correct it. *Bollard,* 196 F.3d at 950. Thus, it required the jury to make only secular judgments, not evaluate religious doctrine or the reasonableness of the [defendant's] religious practices. *Bollard,* 196 F.3d at 950. Therefore, it concluded that the procedural entanglement in allowing the suit to proceed did not rise to a level violating the Establishment Clause. *Bollard,* 196 F.3d at 950.

¶ 46 Analyzing this case under *Bollard,* we first note that the church has not offered a religious justification for Toone's alleged tortious acts. Instead, it has denied that any misconduct occurred and argues that both the ministerial exception and ecclesiastical abstention bar consideration of Erdman's claims. Second, in its employee handbook, the Church specifically recognizes its prohibition against sexual harassment. Third, the Church's Book of Order states that the Session possesses responsibility "to provide for the administration of the program of the church, including ... fair employment practices." CP at 831. Thus, the Church's employment policies and church doctrine prohibit sexual harassment. Fourth, Erdman's negligent supervision and retention claims and the Church's potential defenses involve a limited, secular inquiry similar to the plaintiff's claims and potential defenses under *Bollard.*[FN15]

FN15. In *Bollard,* the Ninth Circuit also noted that, because the plaintiff sought damages as his sole remedy, there was no danger of a remedy requiring continuing court action that would result in excessive entanglement with religion. 196 F.3d at 950. Here, Erdman also sought injunctive relief based only on the Church's discriminatory employment practices. We caution the trial court that should any of Erdman's claims prevail on remand, such injunctive relief would likely violate the Establishment Clause.

¶ 47 The First Amendment does not bar Erdman's negligent supervision and retention claims against the Church.[FN16] Thus, we remand for further proceedings.

FN16. In its amicus brief, the Presbytery cites *Germain v. Pullman Baptist Church,* 96 Wash.App. 826, 980 P.2d 809 (1999), contending that a secular court's review of these claims would result in impermissible government entanglement with religion in violation of the Establishment Clause. Amicus Br. at 9. In *Germain,* Division Three, specifically noting that it was not deciding "whether the First Amendment forecloses *all* negligent supervision claims against churches based on the conduct of their ministers," held that "[t]he determination of whether to impose liability on a church where [the entire congregation held authority to terminate its pastor] would require the court to consider and interpret the church's laws and constitution," thus violating the First Amendment. *Germain,* 96 Wash.App. at 836, 837, 980 P.2d 809. Even assuming we agreed with the reasoning in *Germain,* the record in this case does not indicate that the church's congregation possesses such diffuse authority to terminate the pastor. Therefore, here *Germain* does not apply.

The Presbytery also contends that review of Erdman's claims would violate the greater protection afforded religious beliefs and practices under article I, section 11 of the Washington state constitution. But our Supreme Court has noted in the context of an article I, section 11 case that if a party does not provide constitutional analysis under *State v. Gunwall,* 106 Wash.2d 54, 720 P.2d 808 (1986), then appellate courts will not analyze separate state constitutional grounds in a case. *Open Door Baptist Church v. Clark County,* 140 Wash.2d 143, 151, 995 P.2d 33 (2000). It further stated that a *Gunwall* analysis is still required, even when on-point case law exists where the legal principles are not firmly established. *Open Door Baptist Church,* 140 Wash.2d at 151 n. 6, 995 P.2d 33. Here, the Presbytery did not conduct an

article I, section 11 analysis and this case presents unsettled legal principles. Therefore, we do not further discuss its article I, section 11 argument.

***309** Title VII Claims

[14] ¶ 48 Erdman also argues that the trial court erred in dismissing her federal Title VII claims. She raised Title VII claims of discrimination, harassment, hostile work environment, and retaliation based on her gender and her religious beliefs.

¶ 49 We initially note that Title VII allows religious employers to discriminate based on religion. *See* 42 U.S.C. § 2000e-1(a). Further, there is no individual liability under Title VII. *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 (9th Cir. 2003). Thus, Erdman's Title VII claims based on religious discrimination or harassment fail as a matter of law.

[15] ¶ 50 Nevertheless, her other Title VII claims against the Church do not fail. As the *Bollard* court held that the First Amendment did not bar the plaintiff's Title VII claims based on sexual harassment, they are similarly not barred here. 196 F.3d at 948, 950. Likewise, the Ninth Circuit has held that the First Amendment does not bar Title VII gender discrimination claims against religious employers that prohibit such discrimination, and it does not bar retaliation claims brought by non-ministerial employees. *Equal Employment Opportunity Comm'n v. Pac. Press Publ'g Ass'n,* 676 F.2d 1272, 1279, 1281 (9th Cir.1982), *abrogated as recognized by American Friends Service Committee Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991).[FN17] Therefore, we remand for further proceedings.

FN17. RCW 49.60.180 provides:

> It is an unfair practice for any employer:
>
> ....
>
> (3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability
>
> RCW 49.60.180 was amended in 2006 and 2007. For purposes of this opinion, those changes do not affect our analysis.
>
> RCW 49.60.210(1) prohibits employers from discharging employees who oppose practices prohibited by chapter 49.60 RCW.

Washington Law Against Discrimination

[16] ¶ 51 Erdman further contends that the trial court erred in dismissing her claims under the WLAD due to its non-profit religious employer exemption, RCW 49.60.040(11). She also asserts that the statute is unconstitutional. We begin with the constitutionality argument.

¶ 52 We presume the constitutionality of RCW 49.60.040(11), which exempts non-profit religious employers from the WLAD. *See City of Bellevue v. Lee,* 166 Wash.2d 581, 585, 210 P.3d 1011 (2009). The statute provides:

> "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

RCW 49.60.040(11).

¶ 53 Erdman raises two constitutional arguments. First, she asserts that the statute violates article I, section 12, the privileges and immunities clause of the Washington Constitution. Second, she asserts that the statute violates the equal protection clause of the federal constitution.

***310** ¶ 54 Initially, we note that Erdman cites no relevant authority regarding her article I, section 12 argument. She cites three cases: *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 280 n. 9, 285, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985), *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake,* 150

Wash.2d 791, 813, 83 P.3d 419 (2004), and *Duranceau v. City of Tacoma,* 27 Wash.App. 777, 620 P.2d 533 (1980). *Piper* and *Grant County* establish only the existence of a fundamental right to pursue an occupation. Furthermore, our Supreme Court also has rejected the applicability of *Duranceau* and the proposition that the religious employer exemption is governmental interference with the fundamental right to pursue an occupation in violation of article I, section 12. *Farnam v. CRISTA Ministries,* 116 Wash.2d 659, 680-81, 807 P.2d 830 (1991). Thus, we do not further discuss this argument. RAP 10.3(a)(6).

¶ 55 Likewise, in *Farnam,* our Supreme Court noted that it has often considered the Washington constitution's privileges and immunities clause and the federal constitution's equal protection clause as one issue. 116 Wash.2d at 681, 807 P.2d 830. It observed that the United States Supreme Court reviewed and upheld the federal counterpart to Washington's religious employer exemption under a rational basis standard because the exemption created employer classes based on religion and provided a "uniform benefit to *all* religions" rationally related to the "legitimate governmental purpose" of prohibiting significant government interference with the free exercise of religion. *Farnam,* 116 Wash.2d at 681, 807 P.2d 830 (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 339, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987)). Thus, we may infer from our Supreme Court's observations in *Farnam* that the WLAD's religious employer exemption would be subject to and would survive a rational basis review under the federal equal protection clause. Having rejected Erdman's constitutional arguments, we turn to reviewing the statute's application.

[17] ¶ 56 Erdman brought claims against the Church under the WLAD based on sexual and religious harassment and retaliation for reporting this harassment. She also brought common law claims based on wrongful termination and discharge and retaliation for reporting this harassment and her belief that Toone's actions violated tax laws.[FN18] The plain language of RCW 49.60.040(11) bars her harassment and wrongful discharge claims under the WLAD and the trial court properly dismissed them.

FN18. *See* footnote 14.

[18] ¶ 57 Furthermore, Erdman's common law claims for retaliation, [FN19] wrongful termination, and wrongful discharge fall under the tort of wrongful discharge in violation of public policy. Claimants must demonstrate the existence of a clearly mandated public policy as part of establishing a wrongful discharge claim. *Hubbard v. Spokane County,* 146 Wash.2d 699, 707, 50 P.3d 602 (2002). Article I, section 11 of the Washington Constitution embodies this state's public policy of absolutely protecting "freedom of conscience in all matters of religious sentiment, belief and worship." The Church asserts that it fired Erdman for scripture violations. Thus, the trial court properly dismissed Erdman's common law employment claims based on reporting Toone's harassment.

FN19. Erdman argues that the Church retaliated against her by discharging her for "whistleblowing" regarding the possible negative tax consequences for Toone's tours. She fails to meet the standard that requires her to identify the specific public policy. *Hubbard v. Spokane County,* 146 Wash.2d 699, 707, 50 P.3d 602 (2002) (claimant must demonstrate the existence of a clearly mandated public policy).

Erdman also appears to have pleaded a claim for common law retaliation in violation of public policy. Because we have considered this tort as a single, common law tort of "retaliation and wrongful discharge in violation of public policy," we do not analyze it separately. *See Jenkins v. Palmer,* 116 Wash.App. 671, 677, 66 P.3d 1119 (2003).

Conclusion

¶ 58 We affirm the trial court's discovery rulings. We further affirm the trial court's ***311** order granting summary judgment and dismissing Erdman's common law claims against the Church for negligent infliction of emotional distress, wrongful discharge, retaliation, and wrongful termination in violation of public policy.

¶ 59 We also affirm the trial court's order granting summary judgment and dismissing Erdman's WLAD claims for harassment and wrongful discharge.

¶ 60 We reverse the trial court's grant of summary judgment on her negligent infliction of emotional distress claim against Toone.

¶ 61 We hold that the ecclesiastical abstention doctrine does not bar Erdman's remaining claims. Thus, we reverse the trial court's order granting summary judgment on that basis.

¶ 62 We further hold that the First Amendment does not bar her negligent supervision and retention and Title VII claims against the Church and, therefore, we reverse the trial court's order granting summary judgment on that basis.

¶ 63 Affirmed in part, reversed in part, and remanded for further proceedings. [FN20]

> FN20. As we noted, Erdman did not appeal the trial court's dismissal of her intentional infliction of emotional distress claim and she voluntarily dismissed the portions of her retaliation, negligent infliction of emotional distress, and willful withholding of wages claims that were not based on facts raised in her Form No. 26 grievance.

We concur: ARMSTRONG, J., and PENOYAR, C.J.
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